TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 18

PETER ALFONS BINDCZYCK, PETITIONER,

vs.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1951.

CERTIORARI GRANTED APRIL 30, 1951.

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[1] In the United States District Court for the District of Columbia. Filed June 15, 1948. Harry M. Hull, Clerk.

Civil Action No. 2464-48

PETER ALFONS BINDCZYCK, 85-58 Dongan Avenue, Elmhurst, Long Island, New York, PLAINTIFF

v.

THOMAS G. FINUCANE, individually and as Chairman of the Board of Immigration Appeals, U. S. Department of Justice, Apex Building, Washington, D. C.

TOM CLARK, individually and as Attorney General of the United States, U. S. Department of Justice, 9th and Pennsylvania Avenue, N. W., Washington, D. C., and

WATSON MILLER, individually and as Commissioner of Immigration and Naturalization, U. S. Immigration and Naturalization Service, 19th and East Capitol Streets, Washington, D. C., DEFENDANTS

COMPLAINT FOR A JUDGMENT DECLARING PLAINTIFF A NATIONAL OF THE UNITED STATES; AND FOR A JUDGMENT DECLARING PLAINTIFF A CITIZEN OF THE UNITED STATES; AND FOR INJUNCTIVE RELIEF

Comes now the plaintiff by his attorneys herein and for his complaint against each and all of the defendants does allege as follows:

Count I

1. Jurisdiction over the subject matter of this Count I is conferred upon this Honorable Court by Section 503 of the Nationality Act of 1940, 8 U.S.C. Sec. 903.

2. Defendant, Tom Clark, is the Attorney General of the United States, and as such is the head of the Department of Justice, a [2] department of the United States Government hereinafter denominated the Department. He is officially resident in the District of Columbia.

3. Defendant, Thomas G. Finucane, is the Chairman of the Board of Immigration Appeals (hereinafter denominated the Board), and as such is the head of said Board, an agency of the United States Government in the Department. He is officially resident in the District of Columbia.

4. Defendant, Watson Miller, is the Commissioner of Immigration and Naturalization, and as such is the head of the United States Immigration and Naturalization Service (hereinafter denominated the Service), an agency of the United States in the Department. He is officially resident of the District of Columbia.

5. Plaintiff resides in the city and state of New York.

6. Plaintiff became a national of the United States by naturalization as a citizen of the United States in the Circuit Court of Frederick County, Maryland, on December 2, 1943, all pursuant to the Constitution of the United States, and the governing statutes provided by the Congress of the United States. And his certificate of naturalization, numbered 6089814, was duly issued by said Circuit Court.

7. The order of the Circuit Court of Frederick County, Maryland, admitting plaintiff to United States citizenship, all as alleged in the foregoing paragraph 6, has never been revoked and set aside pursuant to the provisions of Section 338 of the Nationality Act of 1940, 8 U.S.C. Sec. 738, and plaintiff's certificate of naturalization, numbered 6089814, has never been cancelled pursuant to said section 338 of the Nationality Act of 1940.

8. Plaintiff's United States citizenship, acquired as aforesaid by naturalization, has never been lost by expatriation.

[3] 9. Plaintiff's United States citizenship, acquired as aforesaid by naturalization, has never been lost in any way. Plaintiff is and has been ever since December 2, 1943 a citizen and national of the United States.

10. Plaintiff has resided in the United States for a period of ten years beginning in June, 1938.

11. In November, 1942, plaintiff married his wife, Helen Bindczyck, a native-born citizen of the United States. Since

that time, plaintiff has pursued happiness in the bosom of his family, consisting of said Helen, his wife; their daughter, a native-born citizen of the United States, now 2½ years of age; said Helen's mother, a citizen of the United States, now pensioned by the United States Government as the widow of a veteran of the Spanish-American war; and said Helen's five brothers, all native-born citizens of the United States, four of whom served in the Armed Forces of the United States in World War II, two of them now being on pension for injuries received in said service.

12. Plaintiff supports his wife and child by following in the United States his occupation of tool worker and designer.

13. It is the right or privilege of a citizen national of the United States to continue to live at home in the United States; to pursue happiness in the midst of his family, and if that family be all citizens of the United States, living in the United States, to remain with them in the United States; to support his wife and child in the United States by following in the United States a lawful occupation; to vote in local, state, and national elections in the United States; and to be free of the application to him of any statute, regulation, power, or procedure which pertains solely to aliens.

14. Plaintiff is entitled as a citizen national of the United States to all of the foregoing rights and privileges described in paragraph 13.

[4] 15. It is plaintiff's right as a citizen-national to have in his possession the certificate of naturalization, numbered 6089814, which evidences his United States citizenship, and to have such certificate free of any tampering, obliterations, or additions by any one.

16. Each of the foregoing rights and privileges of a national of the United States, described in the foregoing paragraphs 13, 14 and 15, is denied to plaintiff by the Department and its constituent agencies, the Board and the Service.

17. The Department through its Board and Service holds plaintiff in its custody and has finally ordered plaintiff

deported as an alien, despite his insistence that he is a citizen-national of the United States, as aforesaid.

18. The exercise of such powers of custody and deportation, pertaining solely to aliens, deprive plaintiff of his privilege and right as a national of the United States to be free of the application to him of all statutes, regulations, powers and procedure pertaining solely to aliens.

19. Unless this Court declares plaintiff to be a national of the United States, the Department through its Service will deport plaintiff from the United States thus depriving him of his rights and privileges as a national of the United States to live with his family in the United States, and to support his wife and child in the United States by pursuit of a lawful calling in the United States, and thus seriously prejudicing his right and privilege as a citizen-national of the Unted States to vote in national, state and local elections in the United States.

20. The Department through the Service has possession of plaintiff's certificate of naturalization, numbered 6089814. The Service refuses to return said certificate to plaintiff; and, as plaintiff is informed and believes, has marked said certificate "cancelled"; thus depriving plaintiff of his right as a naturalized, citizen-national of the United States to have such evidence of his naturalization free of the tamperings, bliterations, and additions of the Department, Service [5] or any person.

21. After plaintiff's admission as a citizen of the United States by his naturalization as set forth in paragraph 6 above, the Circuit Court of Frederick County, Maryland, upon motion of the Service served, filed and heard on December 9, 1943, entered an order on December 9, 1943 revoking and setting aside its previous order admitting plaintiff to citizenship.

22. Said order of December 9, 1943 purporting to revoke and set aside plaintiff's citizenship is null, void and of no effect.

23. Said order of December 9, 1943, complied in no way with the requirements of Section 338 of the Nationality

Act of 1940, 8 U.S.C. Sec. 738. Said section prescribes the requirements laid down by the Congress for the revoking, setting aside, and cancelling of citizenship obtained by naturalization.

24. The defendants admit that said Circuit Court's order of December 9, 1943 was not entered in accordance with said Section 338 of the Nationality Act of 1940. Nevertheless, the Department through its Board and Service denies plaintiff rights and privileges as a national of the United States upon the sole basis of said order of December 9, 1943.

25. Wherefore plaintiff respectfully prays:

(1) for a judgment declaring him to be a national of the United States;

(2) as ancillary and intermediate relief for a restraining order, and thereafter a temporary injunction enjoining the defendants, pending this Honorable Court's determination of this cause, from prejudicing and mooting such determination and disturbing the status quo by deporting plaintiff from the United States or taking any steps toward such deportation; and

(3) for such other and further relief as may appear appropriate in the premises.

[6] *Count II*

26. Jurisdiction over the subject matter of this Count II is conferred upon this Honorable Court by paragraphs (1) and (22) of Section 24 of the Judicial Code, 28 U.S.C. Sec. 41(1)(22); by Section 274d of the Judicial Code, 28 U.S.C. Sec. 400; and by Sections 262 and 264 of the Judicial Code, 28 U.S.C. Secs. 377 and 378.

27. Plaintiff is a citizen of the State of New York.

28. Defendant Clark is the Attorney General of the United States, and as such has the ultimate executive power in administration of the laws regulating the immigration of

aliens. Defendant Miller is the Commissioner of Immigration and Naturalization, and as such does regularly, under the supervision of defendant Clark, deport from the United States such persons as defendant, Finucane, directs or approves. Defendant, Finucane, is the Chairman of Board of Immigration Appeals, and as such does, under the supervision of defendant, Clark, approve orders of defendant, Miller, or issue orders to defendant, Miller, directing the deportation of persons from the United States.

29. Defendant, Clark, is a citizen of the State of Texas. Defendant, Finucane, is a citizen of the State of Maryland. Defendant, Miller, is a citizen of the District of Columbia. All defendants may be found in the District of Columbia. All defendants are sued in this Count as individuals.

30. Plaintiff incorporates in this Count as if continuously set forth herein in numerical order the allegations of paragraphs 6 through 15, and 21 through 24 of this complaint.

31. Defendant Miller acting under the supervision of defendant Clark, and in accordance with the approval and instructions of defendant Finucane, does wilfully and without authority of law:

(1) hold plaitiff in his custody and restrain him of his liberty, and threatens to, and will, continue to do so unless defendants [7] are restrained by this Honorable Court, all to the irreparable injury of plaintiffs.

(2) threaten to, and will forcibly deport plaintiff from the United States, separate him from his wife and child and other members of his family, deprive him of his home and livelihood in the United States, and prejudice his future right as a citizen to vote in elections in the United States, all to the irreparable injury of plaintiff; and

(3) hold, and will continue to hold plaintiff's certificate of naturalization, numbered 6089814, refuse; and will continue to refuse to return such certificate

to plaintiff, and, on information and belief, has marked such certificate "cancelled," all, unless ordered otherwise, clouding plaintiff's status as a citizen of the United States and to his irreparable injury.

32. The matter in controversy between the plaintiff and each and all of the defendants exceeds $3,000.

33. Plaintiff has no adequate remedy at law.

34. Wherefore plaintiff respectfully prays for:

(1) an immediate restraining order and thereafter a preliminary injunction, pending the determination of this cause, enjoining each and all of the defendants from deporting plaintiff from the United States and from taking any steps toward such deportation;

(2) a declaratory judgment, upon final hearing, declaring plaintiff to be a citizen of the United States;

(3) a permanent injunction, upon final hearing, ordering each and all of the defendants, unless and until plaintiff has lost his United States citizenship in some manner provided by law, to cease exercising any dominion over [8] plaintiff under any of their powers relating solely to aliens, to refrain from deporting plaintiff from the United States and to cease all steps or activities toward such deportation, and to return to plaintiff his certificate of naturalization, numbered 6089814, or a duplicate thereof, without mutilation, tampering, additions, or obliterations by the defendants; and

(4) such other and further relief as may appear appropriate in the premises.

[10] Filed June 15, 1948. Harry M. Hull, Clerk. Civil Action No. 2464-'48.

MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now the plaintiff by his attorneys herein and moves for a temporary restraining order against each and

all of the defendants. In support of such motion plaintiff states that:

1. He resides in the United States together with his wife and child, who are American citizens.

2. Plaintiff has, at the very least, a bona fide and reasonable claim that he is an American citizen.

3. Plaintiff is entitled under the law to a judicial determination of his claim to American citizenship; and accordingly has filed this law suit to secure such determination and for other relief.

4. Nevertheless, defendants have threatened to, and, unless restrained by this Court, will forcibly deport plaintiff from the United States thus separating him from his family and depriving him of the judicial determination of his claim to American citizenship to which he is entitled.

All as set forth in greater detail in the verified complaint which is attached and made a part of this motion.

Wherefore plaintiff prays for a temporary restraining order restraining each and all of the defendants:

[11] 1. from deporting plaintiff from the United States; and

2. from taking any steps toward deporting plaintiff from the United States.

[12] Filed June 15, 1948. Harry N. Hull, Clerk. Civil Action No. 2464-48.

ORDER

Whereas plaintiff has filed herein his motion for a temporary restraining order; and

Whereas the Court has considered such motion, in Chambers; and counsel for the plaintiff there appearing; and

Whereas the Court has considered the papers heretofore filed in this suit, including plaintiff's verified complaint and his motion for a temporary restraining order; and

Whereas it appears to the Court from such motion and such papers that, unless the Court issues a restraining order, plaintiff will suffer irreparable injury in being deprived of his right to a judicial determination on his claim to citizenship:

NOW THEREFORE, it is ORDERED that each and every of the defendants, and their officers, agents, servants, employees, and attorneys are hereby restrained from deporting plaintiff or taking any steps toward the deportation of plaintiff.

This Order shall remain in effect for ten days or until the further order of the Court for good cause shown.

AND IT IS FURTHER ORDERED that plaintiff's motion for temporary injunction be set down for hearing on 24th of June 1948, ... at 10 A.M. in the Motions Court.

T. Alan Goldsborough
Justice

Entered June 15th, 8:45 P.M.

[13] Filed June 24, 1948. Harry M. Hull, Clerk. Civil Action No. 2464-48.

Consent Order Granting Preliminary Injunction

This cause having been set down for hearing on June 24, 1948, upon the application of the plaintiff for a preliminary injunction; and it now appearing that all defendants consent to the entry of a preliminary injunction; and the Court finding that the granting of a preliminary injunction will preserve the status quo pending final determination by the Court of this cause:

NOW, THEREFORE, IT IS ORDERED that each and every of the defendants, and their officers, agents, servants, employees, and attorneys are hereby enjoined from:

1. Deporting plaintiff from the United States; and

2. Taking any steps toward the deportation of plaintiff from the United States.

This order shall endure until the entry of the final order of the Court in this proceeding.

T. ALAN GOLDSBOROUGH
Justice

Entered this 24th day of June, 1948:

Defendants, Thomas G. Finucane, Tom Clark, and Watson Miller, by their counsel herein, do hereby consent to the entry of the foregoing Order granting plaintiff a preliminary injunction.

ROSS O'DONOGHUE
Counsel for Defendants

[14] MOTION TO DISMISS

Come now the defendants and by their attorney, the United States Attorney, move this Court to dismiss the above entitled complaint and for reason therefore state that the complaint fails to state a cause of action upon which relief may be granted.

[15] Defendants' Exhibit No. 1 filed in connection with motion to dismiss.

[16] STATEMENT MADE BY MARCUS AUSTAD
Re: Peter A. Bindczyck

On December 2nd at the Frederick County Courthouse, Frederick, Maryland during the proceedings of a naturalization hearing, I was in the process of addressing a group of 80 naturalization applicants. While addressing this group I noticed one of them with a smirk on his face, leading me to believe that he was insincere. Upon completion of my

remarks I called Bindczyck outside of the courtroom and tried to advise him of the seriousness of naturalization. I told him that he looked insincere when I was telling the group that naturalization was a rare privilege afforded to comparatively few people on this earth and that there were many people in Europe who would gladly trade places with him. I stated that now was the time to make known his sincerity or insincerity. Whereupon he replied, looking as though he were hurt, that I was mistaken. Then I told him that if I was mistaken I was sorry and I apologized. Whereupon he returned to the courtroom and in a few moments the Judge came in and proceeded with the swearing in of the applicants.

The following day Bindczyck received a promotion which was indicative of assignment overseas. He immediately contacted the assignment officer and stated in direct contradiction to the oath he had sworn to the day prior stating that he would not fight against Germany or Japan. He was immediately arrested and brought under guard to the Post Intelligence Officer, Major William L. Dooley. Major Dooley interrogated Bindczyck for an hour and a half attempting to gain his confidence and to determine why he had this change of heart, if it was a change of heart. This was all to no avail. Bindczyck stated that he had been mistreated in this country and had been persecuted to no end; that he had no love for this country and would not fight either against Germany or Japan. At this time Bindczyck signed a statement to that effect.

CPL. MARCUS J. AUSTAD

Dec. 7, 1943.
Washington, D. C.

Sworn to before me this 7th day of December 1943,

JAMES S. HAMILTON, JR.
U. S. Naturalization Examiner.

[17] In the matter of the Naturalization Proceedings of Peter Alfons Bindczyck.

Petition No. 299-M. In the Circuit Court for Frederick County, Maryland.

STENOGRAPHIC TRANSCRIPT of hearing held before Chief Judge Edward S. Delaplaine, December 9, 1943.

Present: Leicester W. Cook, Esq., of the Immigration and Naturalization Service, Washington, D. C.

Major William L. Dooley; Corporal Marcus Austad.

Peter Alfons Bindczyck.

(Mr. Cook) Your Honor, the Government has here a motion to set aside and vacate the order of admission signed by this Court on December 2nd relative to the admission to citizenship of Peter Alfons Bindczyck, Petition No. 299, filed in this Court on that same date. Is Peter Alfons Bindczyck here now?

(Bindczyck) Yes.

Q And you are the same person who filed a petition on December 2nd, is that right?

A. Yes.

Q And you have read those papers I served you?

A Yes, sir.

CORP. MARCUS AUSTAD, being first duly sworn, deposes and testifies as follows:

By Mr. Cook:

Q You are Corporal Marcus Austad of Camp Ritchie, is that right?

[18] A That is correct.

(Mr. Cook) I wish to offer this affidavit, copy of which has been furnished the applicant, in evidence)

Q You were present on December 2, 1943, when the applicant, Peter Alfons Bindczyck, was admitted to citizenship?

A Yes.

Q Did anything occur on that day which led you to believe he may not be sincere in his statement?

A As always, I addressed the group, a group of 80, and told them of the seriousness of citizenship and the privilege involved therein, and as I scanned the Court room as I usually do, I noticed one soldier who led me to believe by his appearance that he was not sincere, and in the presence of the 80 and of the two naturalization examiners and two men who were with me, I asked that man out of the Court room to have a little talk with him, and I spoke to him out there and asked him if he was sincere, and asked him to tell me that if was not sincere that now was the time to make that known. He said that I was mistaken, that these grins or smirk on his face was that I had taken that in error, and with those words I pardoned myself for having judged him incorrectly, and told him to go back and sit down, and the Court proceeded.

Q Did anything happen on December 3rd which would lead you to believe that this man did not take the oath of allegiance on December 2, 1943, with all sincerity?

A The morning of December 2nd, while he was down here in Court, he was promoted to Technician, Third Grade. The next morning after he returned from Court here, from the Naturalization Court, he returned to Camp Ritchie, and that morning he went to the assignment officer and said words to the effect that he wouldn't fight, whereupon he was brought down to the Post Intelligence [19] Office to Major Dooley, who is here today, and stated the same thing, and the Major then talked to him for quite a while and tried to gain his confidence and told him what would happen, and tried to get the idea behind the man's sudden change of heart, whereupon he still maintained that he wouldn't fight, that he had no love for this country and that he would sign a statement to that effect, which he did.

Q (The Court) What effect does his conduct have on his military service? Does he remain in the United States Army?

A That I don't know. I don't know just what we will have. Major Dooley perhaps will be better qualified.

MAJOR WILLIAM L. DOOLEY, being first duly sworn, deposes and says:

By Mr. Cook:

Q What is your name?

A William L. Dooley, Major QMC, Post Intelligence Office, Camp Ritchie.

Q You questioned this applicant on December 3 regarding his loyalty and his willingness to fight for the United States, is that correct? A. I did.

Q Did he indicate that he was unwilling to bear arms for the United States? A. He did.

Q Did he indicate that he did not wish to remain in the United States after this war was over? A. He did.

(The Court) I might ask you if you know what effect his action has on his military service.

A His future military service, the Army can take care of it, and if they decide not to, then the Department of Justice can.

[20] Q He is the only one of the men who has acted in this manner?

A Yes, sir.

Q Has he been performing his duties properly in the last week?

A He has. In the last week he has been out to one of our sort of little bivouac camps and I haven't been out there.

Q What is his military rank?

A Right now he is Private, but he had been promoted, having qualified for a special type of assignment, and he seemed to rank a promotion I think at the time of the naturalization, and was to be part of a group scheduled to

perform special duties for which he had been trained and qualified, and he became of this frame of mind. As is said in one of the statements here, dealing with juveniles in trouble over twelve years in New York City, trying to understand the cause and then bringing about an adjustment, I tried to get at the root of his feelings. It seems to center around—he has a feeling of persecution, not due to any act or actions of anybody that he has come in contact with in the Army since his induction, but all happened back in civil life—very unfair experiences that seem to be cropping up in his mind now and may be causing his disaffection. Although I tried to point out that nothing we can do now can right this trouble and that many of us have that trouble of unjust treatment and so forth in the past, to keep thinking of it prevents him from doing a good job in the future, and tried to remove that feeling of persecution that may have cropped up in his mind, which maybe was justified at that time—I mean before he came in the Army. Since coming in the Army he has been able to have the opportunity to try to use the qualifications he has, he has succeeded and proved capable, and I told him that the future would be enhanced, his chance of getting along in the event of an honorable discharge after the war, and that the action he was [21] taking now would be an obstacle in his path; in plain words, I told him he was putting himself behind the eight ball, and that nobody was persecuting him but himself.

Leicester W. Cook, Examiner, being first duly sworn, deposes and says:

By the Court:

Q What do you know about the case of Bindczyck?

A On December 2, 1943, I was assigned with another officer of our Service—the Immigration and Naturalization Service—to conduct naturalization proceedings under Section 701 of the National Act of 1940, and among the eighty applicants that we had on that day was Peter Alfons Bindczyck. He was asked the usual questions, that is,

whether he believed in this form of Government and his answer was yes; and he was also asked the question as to whether he was willing to bear arms against all enemies of the United States, and his answer was also yes.

Q You have had no contact with him since?

A I have not talked to him since except to serve the notice of this hearing upon him.

PETER ALFONS BINDCZYCK, being first duly sworn deposes and says:

By Mr. Cook:

Q What is your name?

A Peter Alfons Bindczyck.

Q Are you a soldier in the United States Armed Forces at the present time? A. Yes.

Q Whereabouts are you stationed?

[22] A Camp Ritchie, Maryland.

Q Were you present on December 2, 1943, when a group of soldiers were examined and filed petitions for citizenship and admitted in this Court to citizens at that time?

A Yes.

Q Did you testify on that date that you believed in this form of Government?

A No, I didn't.

Q Did you testify that you were willing to bear arms against all enemies? A. Yes.

Q You were served with some papers today. Have you read those papers? A. Yes.

Q Did you read that affidavit which was dated December 3rd and signed by you? A. Yes.

Q I now show you this affidavit and ask you if that is your signature? A. Yes, it is.

Q And did you make that affidavit voluntarily?

A I was asked to make an affidavit. That is why I did it.

Q Why were you asked to write such an affidavit?

A To have some kind of evidence or whatever you might call it to present about my opinion.

Q This affidavit clearly sets forth your opinion, is that correct? A. Yes.

Q You do not wish to change that statement in any way?

A Could I read it once more, please? (Referring to paper marked Exhibit B.) When I said here that—"and wish to go back to Germany after the war," I supposed that Germany will have a different government, and not the same Nazi government.

Q That is presumed to be true, but the affidavit sets forth your feelings that you do wish to return to Germany, is that correct?

A Not necessarily. I have my choice. I mean if I don't [23] want to fight for this country I can't expect to remain in this country, and the country I came from is Germany. That is why I mentioned Germany here.

Q You definitely do not wish to fight for the United States, is that correct?

A No, that is correct.

Q When you were here on December 2, 1943 and filed your petition, did you feel the same way at that time?

A Yes.

Q How long before had you felt that way?

A. I have felt that way for several weeks, but I mean it just didn't pop up that way.

Q. You felt that way when you came in here and filed the petition on the morning of December 2, 1943, is that correct?

A Yes.

Q (The Court) Did I understand you to say you did swear that you approved of this Government and that you would fight for this country?

A While I was in Court here, yes, sir.

Q You were swearing falsely at that time?

A Yes, sir.

Q (Mr. Cook) Is there anything further you wish to say in this matter?

A Well, the reason why I swore falsely is because that some people have had me before and while I was an alien, and I figured that these people were nice people and I didn't want to bring them any trouble. While I was an enemy alien, I figured being I was made a citizen would sort of break up the connections between these people and me, because in a way they were sponsors for me, because one of the witnesses who was my sponsor and many other people signed statements about me, about my character and so on.

Q (The Court) Is that all? A. Yes, sir.

[24] At a Special Hearing in the Circuit Court, Frederick County, held at Frederick, Maryland, this 9th day of December, 1943

MOTION ON BEHALF OF THE UNITED STATES GOVERNMENT TO VACATE AND SET ASIDE ORDER OF ADMISSION TO CITIZENSHIP IN THE CASE OF PETER ALFONS BENDCZYCK, PETITION No. 299

PETITIONER personally appeared this date to show cause why the order of admission to citizenship dated December 2, 1943, should not be vacated and set aside.

UPON hearing the testimony and the evidence submitted in this cause of action, and motion having been made on behalf of the United States Government by Leicester W. Cook, United States Naturalization Examiner of the Immi-

gration and Naturalization Service, Washington, D. C., to vacate and set aside order of admission to citizenship dated December 2, 1943, it is hereby

ORDERED that the order of admission to citizenship dated December 2, 1943, List No. 22, with respect to Line No. 14, Sheet 1, as to petitioner PETER ALFONS BENDCZYCK, Petition No. 299, is hereby vacated and set aside, and restored to the pending calendar for immediate hearing, and it is further

ORDERED that the original and duplicate certificate of naturalization No. 6089814 issued thereon be voided and returned to the Immigration and Naturalization Service.

EDWARD S. DELAPLAINE
Chief Judge of the Circuit Court for
County, at Frederick, Maryland,

[26] PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, by his attorney herein, and respectfully moves the Court for summary judgment in his favor, granting the relief prayed for in his complaint. And for reasons therefor plaintiff respectfully states that there is no material issue of fact, and that plaintiff is entitled to judgment as a matter of law.

[27] ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard on Monday, January 31, 1949, upon Motion of the Defendants to Dismiss and Motion of the Plaintiff for Summary Judgment. Upon consideration of said motions, the exhibit to said Motion to Dismiss and the Points and Authorities filed in support of said motions, and after hearing the argument of counsel for both sides in open court, the Court finds that there is no genuine issue of fact, and concludes that the Plaintiff is entitled to judgment as a matter of law. Therefore, it is ORDERED that:

1. The Defendants' Motion to Dismiss is denied,

2. Plaintiff's Motion for Summary Judgment is granted.

3. Plaintiff is declared to be a national and citizen of the United States.

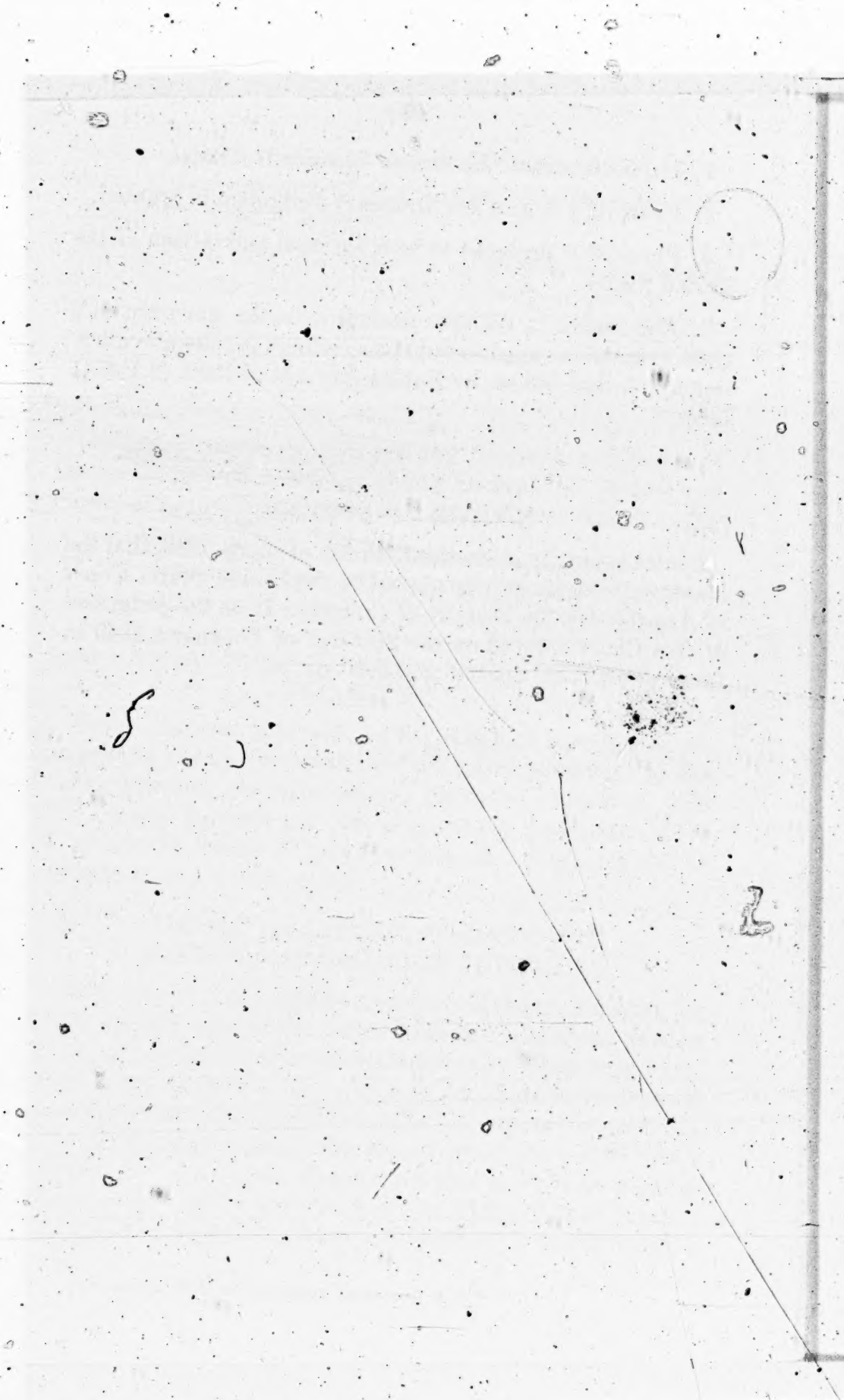
4. This order is without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940. (8 U.S.C. 738).

DAVID A. PINE, *Judge.*

[28] NOTICE OF APPEAL

Notice is hereby given this 20th day of April, 1949, that the above defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of February, 1949 in favor of plaintiff against said defendants.

☆ U. S. Government Printing Office, 1949 J856382/179



[fol. 22] Minute entry of argument and submission February 13, 1950, omitted in printing.

[fol. 23] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10287

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS; J. Howard McGrath, Individually and as Attorney General of the United States; Watson B. Miller Individually and as Commissioner of Immigration and Naturalization, Appellants

v.

PETER ALFONS BINDCZYCK, Appellee

Appeal from the United States District Court for the District of Columbia

Argued February 13, 1950—Decided June 19, 1950

Mr. L. Clark Ewing, Assistant United States Attorney, with whom *Messrs. George Morris Fay,* United States Attorney, *Ross O'Donoghue,* Assistant Unifed States Attorney, and *Joseph M. Howard,* assistant United States Attorney, were on the brief, for appellants.

Mr. Joseph A. Fanelli for appellee.

Before Clark, Wilbur K. Miller and Proctor, Circuit Judges

OPINION

CLARK, Circuit Judge:

The appellants, defendants below, have prosecuted this appeal to test the validity of a summary judgment in favor of the appellee, Bindczyck, declaring him to be a citizen of the United States and granting him appropriate injunctive relief.

Peter Alfons Bindczyck, while a member of our armed forces stationed at Camp Ritchie, Maryland, became a

citizen of the United States by naturalization order of the Circuit Court of Frederick County, Maryland, on December 2, 1943, and his certificate of naturalization, No. 6089814, was duly issued by that court. Seven days later, on December 9, 1943, within the same term of the same court, on motion by Leicester W. Cook, United States Naturalization Examiner of the Immigration and Naturalization Service, Washington, D. C., made on behalf of [fol. 24] the United States Government in the original proceedings, "the order of admission to citizenship . . . [was] vacated and set aside, and restored to the pending calendar for immediate hearing, and . . . the original and duplicate certificate of naturalization . . . [was ordered] voided and returned to the Immigration and Naturalization Service."[1] The basis for that court's order, as appears from the transcript of the hearing on the motion filed in the United States District Court for the District of Columbia in connection with appellants' motion to dismiss the complaint, was that Bindczyck's, shortly after he was naturalized, made statements to the effect that he had no love for the United States and that he would not fight for this country. At the hearing on the motion in the Maryland court he testified that he had previously stated in court that he was willing to bear arms against all enemies and that he approved of this government, whereas neither statement was true and he was testifying falsely at the time.

Although appellee mentions that the motion was filed, served, heard and decided all on the same day; that he was away from home under military orders and under military arrest at the time; and that he was without counsel, he specifically waives any rights that he might have acquired had any of this procedure departed from the rules of the Maryland court or from the constitutional guarantees of due process on the ground that they are irrelevant to the issue presented here. And the appellants admit that the procedure by which appellee's naturalization order was set

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[1] Order of the Circuit Court, Frederick County, Maryland, entered December 9, 1943, after a special hearing on motion to vacate and set aside Bindczyck's naturalization order and signed by Edward S. Delaplaine, Chief Judge.

aside and vacated in no way complies with section 338 of the Nationality Act of 1940[2] which provides:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

[fol. 25] Nor would we now hesitate to uphold appellee had the appellants, though proceeding as they did, purported to have acted pursuant to the provisions of the aforesaid section. In such cases the authorities are abundantly clear in denying the allowance of the order vacating and setting aside a naturalization where the strict letter of section 338 as laid down by Congress is not followed. But appellants' position is that that section (and its predecessor, section 15 of the 1906 Act,[3] which for the purposes of this opinion is substantially the same) does not abridge the heretofore existing remedies for setting aside and vacating such orders but merely enlarges them. Section 338 is simply cumulative in effect and does not provide the only and exclusive method whereby a naturalization order may be vitiated. Appellee, on the other hand, has taken the position, which prevailed below, that Congress, by virtue of the Constitution which empowers it "to . . . establish uni-

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[2] 54 Stat. 1158, 8 U. S. C. 738.

[3] 34 Stat. 601, 8 U. S. C. (1934 ed.) 405.

form rule of naturalization,"[4] has, by enacting section 338 of the Nationality Act of 1940, and its predecessor section 15 of the 1906 Act, effectively foreclosed the possibility of vacating and setting aside an order of naturalization by any other method than the one thus prescribed; and, since the government has not proceeded in accordance with that section, the appellee is entitled to a declaratory judgment proclaiming his citizenship.

That Congress has the power to enact uniform laws governing denaturalization cannot be doubted.[5] But the first question before us involves the extent to which Congress has exercised this power, and not whether the power exists to the extent which would be necessary in order to sustain appellees position; for only if we conclude that it has exercised this power so as to make the remedy thus provided exclusive of all others that may have heretofore existed, would we then have to decide whether the constitutional grant extended so far. Doubt has been expressed in that regard.[6]

Little has been written on the question before us, and so before we proceed to an examination of whatever authority there is on the subject, it will be helpful to place the problem in its proper posture. Stripped to its essentials the question is: Has Congress, by enacting a statute governing denaturalization, proscribed the power of a naturalizing court of proper jurisdiction to set aside, vacate, and assign for rehearing its own order of naturalization within the same term of court, in the same manner, and on the same grounds as any other of its judgments similarly assailed?

[fol. 26] There are certain basic fundamentals with which we should first acquaint ourselves. These are:

(1) An order of naturalization is like any other judgment of the court issuing the order.[7]

(2) Judgments of a court of record are appealable.[8]

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[4] Art. 1, sec. 8, cl. 4.

[5] Knauer v. United States, 328 U. S. 654, 673, 90 L. Ed. 1500, 1511, 66 S. Ct. 1304, 1314 (1946).

[6] In re Macoluso's Naturalization, 237 Pa. 132, 85 Atl. 149, Ann. Cas. 1914 B 226 (1912).

[7] Tutun v. United States, 270 U. S. 568, 70 L. Ed. 738, 46 S. Ct. 425 (1926).

[8] And naturalization orders are appealable, Tutun v. United States, *supra*, note 7.

(3) Under proper circumstances judgments of a court of record are subject to being opened up, modified, corrected, set aside, and vacated.[9] The power of a court to so act, though much modified today by statute, existed at common law [10] and has always been exercised in the judicial discretion of such court.[11]

(4) The proceeding to vacate a judgment, especially when made within the same term of court, is generally regarded as a further proceeding in the same action.[12]

(5) A statutory remedy is to be considered as cumulative of existing common law remedies, unless the contrary is so declared in express terms or by necessary implication.[13]

From the foregoing it would appear, therefore, that independently of any decisional law, the Circuit Court for Frederick County, Maryland, has the power to set aside and vacate its own naturalization order within the same term of court in the same way that it may set aside and vacate any other of its judgments. But the appellee insists that section 338 of the Nationality Act of 1940 as well as its predecessor were clearly intended by Congress to be exclusive of all other pre-existing methods of denaturalization. With but one exception, however, (*United States ex rel. Volpe* v. *Jordan*),[14] none of the cases cited by him refer to the situation here but rather to a proceeding in which the Government has avowedly sought its authority to act from either section 15 of the 1906 Act or section 338 of the current Act. Of course the broad language gleaned from these cases supports the proposition that there must be strict compliance with the statute. There is no question that Congress so intended. But it is self evident that these cases cannot be used as authority on the present question, especially in view of the fact that in none of them does the government contend, even though it may have failed to com-

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[9] 31 Am. Jur. 263, and cases cited therein.

[10] Sunderland, et al. v. Braun Packing Co., et al., 119 Md. 125, 130, 86 Atl. 126, 127, Ann. Cas. 1914 D 166 (1912).

[11] Sunderland, et al. v. Braun Packing Co., et al., *supra*, note 10, at 129, 86 Atl. at 127.

[12] 31 Am. Jur. 268.

[13] Hoage v. Murch Bros. Const. Co., 60 App. D. C. 218, 220, 50 F. 2d 983 (1931).

[14] (C. C. A. 7, 1947) 161 F. 2d 390.

ply with the statutory conditions for denaturalization, that the authority to proceed as it did could be found elsewhere. Furthermore, as far as we have been able to ascertain, in [fol. 27] none of these cases was the attempted denaturalization instituted in the court issuing the naturalization order within the same term that the order was issued, as a part of the original proceeding, rather than as a separate proceeding under the statute. Likewise, appellee, in taking issue with the appellants' statement to the effect that the legislative history affords us little help in determining the intent of Congress, alludes to language in committee reports, statements of Cabinet Officers, and a statement made on the floor of the house, which gives as little support for his position as is found in those cases cited by him which we have rejected for inappositeness. Whatever language there may be is broad, vague and indefinite as pertains to the precise question before us.

Appellee is left, therefore, with but one clear authority in his favor, the *Volpe* case, where the question before the court was whether or not the respondent's plea in bar to Volpe's petition for writ of habeas corpus for release from respondent's custody on the ground that he (Volpe) had been unlawfully denaturalized should be sustained. Volpe, who had been naturalized by order of the Superior Court of Cook County on March 27, 1920, had his naturalization order vacated and set aside by that same court seven days later. In his petition he alleged that this had been unlawfully done because he had received no notice of the motion to vacate and set aside the order. The respondent's plea in bar was based on a prior case in which Volpe had sought to test the validity of a deportation order and which was adversely decided against him by the Supreme Court. It was respondent's position that all the questions involving the alienage of Volpe including his deportability were adversely decided against him in that case. In reversing the lower court for sustaining this plea in bar the court held that it was apparent from reading the opinions in the deportation litigation that the issue now presented was not decided, and the plea in bar was improperly sustained. At this point the court's opinion was sufficient to remand the case in order that the lower court might initially determine the issues as to the legality or illegality of the petitioner's denaturalization; but instead of doing that it chose to proceed with the

remarks, *inter alia*, relied on so heavily now by the present appellee. It held, in essence, two things: (1) That the Nationality Act of 1940 provided the exclusive method whereby a person could be denaturalized, and (2) even if the Nationality Act was not exclusive, the proceedings complained of would be void for failure to give notice pursuant to the rules of the Superior Court of Cook County. Appellants here contend that that court's holding in regard to the exclusiveness of remedy under the Nationality Act is *dicta*; but whether it is or not is immaterial to us; for in any event [fol. 28] we feel it lacks force as authority for the reason that we believe it is based on a misunderstanding of the effect of a naturalization order as a judgment and of the effect that the Federal Rules of Civil procedure have on such proceedings.

The *Volpe* decision states:

"[A] State court when acting in naturalization matters does so as a Federal court or as an agent of the Federal government. It seems plain that when acting in such capacity it cannot depend upon an iota of authority which may stem from its own rules or the State law, whether embodied in statutory provisions or in the decisions of its courts." [p. 395.]

From this it concludes that it had no authority or jurisdiction to act in the premises unless pursuant to the federal statute. Principal reliance for this proposition is placed on a statement in *Grahl* v. *United States* [15] which when taken out of context would seem to lend support; but examined in the light in which it was used it is clear that it is conditioned by the purpose for which it was used, namely, to rebut the contention that the federal courts had no authority to vacate naturalization orders of state courts because that amounted to an invasion of the sovereign power of the state. That this statement from the *Grahl* case would not have been intended to convey the meaning ascribed to it is borne out by another statement found on the same page where it was said:

"A court that has jurisdiction of a stated subject-matter and has the necessary parties before it is empowered to act honestly upon a mistaken view of the law as fully as upon a

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[15] (C. C. A. 7, 1919) 261 Fed. 487.

correct view; and its judgment, though based on errors of law, is impervious to collateral attack in other courts or in the same court, but not to direct attack. Direct attacks, through motions for rehearing, bills of review, and appeals, are usual and of old-time familiarity. Procedure under section 15 is new and unusual. But none the less it is plainly a direct attack." [p. 490.]

The *Volpe* decision also relies upon *United States* v. *Ankervik*[16] to support this position, but in that case there is such clear *dicta, contra,* sustaining the appellants' contentions in the present case that we set it out in full:

"[A naturalization order] being a judgment with the ordinary characteristics or attributes of a judgment of a court of record importing verity, it is not more vulnerable to attacks upon its validity and effectiveness as a final and conclusive adjudication than any other judgment of a court of record having competent jurisdiction in the premises. Following this is the contention that a judgment of the kind, under the long-established and well-settled practice of the courts of equity, cannot be impeached by direct proceeding for fraud, consisting of perjury or false swearing in rendering testimony, whereby the court was induced to give the judgment, nor for errors of the court in its deduction from the testimony adduced from which the judgment proceeded. Courts generally, excepting some perhaps of the [fol. 29] more limited, have jurisdiction to reverse their own judgments and decrees during the term at which they are rendered. In pursuance of such authority they may, for error of law, or for fraud, mistake, or any irregularity that might seem to them to have affected either of the parties to the controversy injuriously, set aside their judgments and decrees, and award a new trial or rehearing, and thus give opportunity for righting whatever wrong may have been engendered. After the term has ended, however, the authority of the courts to this purpose ceases, unless extended by statute, or by motion, or some appropriate procedure taken within the time. This rule applies as well to equity procedure as to procedure at law. Other means of relief for the errors of the court are usually afforded by writ of error or appeal, and in equity a bill of review will lie, within

[16] (D. C. Ore., 1910) 180 Fed. 137.

rules prescribed by law, for evidence discovered after the decree has become final. All such proceedings [sic] are taken and prosecuted in the same suit or action and not by separate controversy. When, therefore, the term is at an end without the appropriate initiation of an available proceeding to revise or set aside the court's final judgment or decree, and no appeal or other means of review is prosecuted within the time afforded by authoritative regulation, such judgment or decree becomes an absolute finality, forever binding upon the parties and their privies, utterly without power of change, revision, revocation, or relief within the cause or proceeding in which it is rendered." [p. 143.]

The *Volpe* case also seems to find some support for its position in the Federal Rules of Civil Procedure, Rule 81 (a) (2) and (6). Rule 81 (a) (2) states:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity; admission to citizenship . . ."

And Rule 81 (a) (6) says:

". . . The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under . . . 338 . . . remain in effect . . ."

All that Rule 81 (a) (2) does is make the Federal Rules of Civil Procedure applicable to naturalization proceedings on appeal by either party. And all that Rule 81 (a) (6) does is make them inapplicable as regards to the time allowed for notice and answer in proceedings under section 338 of the Nationality Act of 1940. But we cannot see how this helps that court because it still does not say that the rules are inapplicable in cases such as this one where there is an attempt to vacate and set aside a naturalization order during the period when the court still has jurisdiction over the proceedings. At best the Federal Rules are equivocal on this point. It certainly cannot be said that they support the view that the proceedings under section 338 are exclusive of

all other methods by which a naturalization order may be vacated and set aside.

[fol. 30] Nor does the *Volpe* decision even mention the earlier case of *In re Macoluso's Naturalization*,[17] a leading authority for appellants' position here. As authority therefore, the *Volpe* case stands much weakened in our eyes.

Appellants rely principally on *In re Macoluso's Naturalization*,[18] *United States* v. *Aakervik*,[19] *Petition of Weltzien*,[20] and *United States* v. *Ovens*.[21] Of these the *Macoluso* case, being most directly in point, is the strongest authority favoring their position, and appellee has been unable to assail its holding other than to say that it presents a remarkable illustration of the wisdom of Congress in making section 338 exclusive because there the naturalization certificate of a person dead for many years was cancelled. In addition to assuming his premise for the purposes of his observation, appellee also fails to realize that the *Macoluso* case was a leading authority of 28 years standing for the very proposition now in issue when Congress in 1940 substantially reenacted section 15 of the 1906 Act. Certainly, had Congress felt that it presented an evil to be rectified, it would have indicated in some way its intention to correct the impression of that case.

The *Weltzien* case involved a motion by the government for a rehearing on newly discovered evidence in a naturalization proceeding. The motion was made within the same term of court and in no way complied with the requirements of section 338. The district court denied the motion but in doing so had to meet the contention that the government's exclusive remedy was under section 338. It said in this regard:

". . . Even a perfunctory examination of the matter discloses that this argument is untenable.

"Sec. 738 [sec. 338] which is practically identical with Sec. 15 of the Nationality Act of June 29, 1906, outlines the procedure to be followed in a cancellation or revocation proceeding and is supplemental to any other remedy which is

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[17] Note 6, *supra*.

[18] Note 6, *supra*.

[19] Note 16, *supra*.

[20] (D. C. N. Y., 1946) 68 F. Supp. 1000.

[21] (C. C. A. 4, 1926) 13 F. 2d 376.

available to obtain a rehearing of the original naturalization proceeding. . . .

"The proceeding before this court is not a revocation or cancellation proceeding. It is, as I stated at the outset, an application for a rehearing predicated upon alleged newly discovered evidence. If I am correct in my assertion that an order granting citizenship is no different than any other judgment, it must of necessity be as vulnerable as any other kind of judgment.

"There have been instances where petitions for naturalization have been denied and thereafter, on motion of the government, granted on newly discovered evidence. Obviously in such situations no problem is encountered since both the government and the petitioner are satisfied.
[fol. 31] "The converse of this proposition is equally true. So that an order granting citizenship may be vacated on newly discovered evidence." [p. 1002]

Although not involving precisely the point in issue here, the *Welzien* case certainly supports the appellants' position. Appellee attacks it by saying, "The statement is described, by Judge Mandelbaum who made it, as 'a perfunctory examination of the matter'" which has been "authoritatively held erroneous in its own jurisdiction. See *U.S. ex rel. Stabler* v. *Watkins*, 168 F. (2d) 883 (C. C. A. 2nd, 1948)." Appellee is in error, however, in saying that Judge Mandelbaum's words in regard to a "perfunctory examination" of the matter purport to characterize the type of examination which he makes in the following paragraphs. Appellee conveniently omits the word "even" from his quotation. Nor is there any support for appellee's claim that this statement had been held "authoritatively erroneous." The case which he cites, *arguendo*, for the holding, neither mentions the *Weltzien* case nor in any way attempts to deal with this kind of a situation. It falls into that group of cases cited by appellee which are inapposite to the question at hand because they deal with the entirely different situation where the government is professedly proceeding under the statute to set aside a naturalization order.

The *Ovens* case cited by appellants inferentially supports their contentions. There the court held that although the government had failed to appeal from the denial of a motion to cancel and declare void a naturalization certificate made in the same court, within three months of the issuance of

the certificate, the government was not thereafter estopped from bringing an independent bill in equity elsewhere at a later date for cancellation of the naturalization certificate because such a motion in the original proceedings is not the equivalent of a proceeding under section 15 of the 1906 Act. The court said at page 377 that that section "creates a new remedy, which in some respects is broader than that existing independently of statute . . ." though narrower than the protection afforded the government on appeal in the original cause.[22] Thus the court indirectly recognized that the government in effect has two bites of the apple in these proceedings, one by motion in the original cause and the other by the statutory proceeding. Appellee thinks that the "necessary rationale" of the decision supports his view that the motion in the original proceeding was void for noncompliance with the statute and hence was not a bar to the later action by the government. Otherwise, he claims, all the requirements of *res judicata* were present. What he has failed to realize, however, is that an additional remedy has been created by [fol. 32] statute which removed such proceedings from the bar of *res judicata* created by the adjudication in the original cause.

We have already sufficiently dealt with the *Aakervik* case, *supra*. Admittedly the statements there are *dicta*, but they clearly support appellants' position here, and are not, as appellee characterizes them, ambiguous.

Certainly, as we have said, independently of any decisional law, we would hold in favor of the appellants because of the inherent and historical power of a court over its own judgments within the same term in which they were rendered; because of the fact that it has been held by the Supreme Court that orders of naturalization are like any other judgments of the court issuing the order; and because such powers of a court are not to be construed cut off unless by explicit language. But in addition the weight of authority favors the appellants, and it is the opinion of this court that section 338 of the Nationality Act of 1940 is cumulative in effect and does not exclude the other available remedies for setting aside and vacating naturalization orders as judgments at least while the issue is still in the course of its original proceeding.

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[22] Tutun v. United States, *supra*, note 7.

It follows, therefore, that the District Court erred in granting appellee the summary judgment. The case is accordingly reversed and remanded with instructions to the lower court to enter a judgment dismissing the complaint pursuant to appellants' motion below.

Reversed and remanded.

[fols. 33-44] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

April Term, 1950

No. 10287

THOMAS G. FINUCANE, individually and as Chairman of the Board of Immigration Appeals, et al., Appellants,

v.

PETER AFONS BINDCZYCK, Appellee

Appeal from the United States District Court for the District of Columbia.

Before: Clark, Wilbur K. Miller, and Proctor, Circuit Judges.

JUDGMENT—June 19, 1950

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to enter a judgment dismissing the complaint upon defendants' motion to dismiss.

Per Circuit Judge Clark.

Dated June 19, 1950.

Petition for rehearing covering 9 pages filed July 3, 1950 omitted from this print.

[fol. 45] UNITED STATES COURT OF APPEALS

[Title omitted]

Before: Clark, Wilbur K. Miller, and Proctor, JJ.

ORDER—September 28, 1950

Upon consideration of appellee's petition for rehearing before the full Court of the appeal herein, It is

Ordered by the Court that appellee's petition for rehearing before the full Court of the appeal herein be, and it is hereby, denied.

Per Curiam.

[File endorsement omitted.]

[fols. 46-47] Designation of record omitted in printing.

[fol. 48] Clerk's Certificate to foregoing record omitted in printing.

[fol. 49] UNITED STATES COURT OF APPEALS

[Title omitted]

Before Clark, Wilbur K. Miller and Proctor, Circuit Judges

ORDER—November 21, 1950

It is Ordered by the Court sua sponte that the order entered herein September 28, 1950, denying appellee's petition for rehearing of this case before the full Court be, and it is hereby, vacated.

Per Curiam.

[File endorsement omitted.]

[fol. 50] UNITED STATES COURT OF APPEALS

[Title omitted]

Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy, and Washington, Circuit Judges

ORDER—December 21, 1950

On consideration of the appellee's petition for a rehearing in banc of the appeal herein, it is

Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

[File endorsement omitted.]

[fols. 51-52] Supplemental Designation of Record omitted in printing.

[fol. 53] Clerk's Certificate to foregoing record omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 30, 1951

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

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IN THE

Supreme Court of the United States

October Term, ~~1950~~ 51

No. ~~612~~ 12

PETER ALFONS BINDCZYCK, *Petitioner*,

v.

THOMAS G. FINUCANE, Individually and as Chairman of the Board of Immigration Appeals, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH A. FANELLI,
Washington, D. C.

ISIDORE ENGLANDER,
New York City, New York.

Washington, D. C.,
March, 1951.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1950

No.

PETER ALFONS BINDCZYCK, *Petitioner,*

v.

THOMAS G. FINUCANE, Individually and as Chairman of the Board of Immigration Appeals, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, by his counsel herein, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 19, 1950.

OPINIONS BELOW.

The judgment of the District Court (R. 20-21) was issued without opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 23ff.) is reported at 184 F. (2) 225.

JURISDICTION.

The judgment of the Court of Appeals (R. 33) was entered on June 19, 1950. A petition for rehearing timely filed (R. 34) was first denied by order of the Court of Appeals entered on September 28, 1950 (R. 45). On November 21, 1950, the Court of Appeals on its own motion vacated its order of September 28, 1950, denying the petition for rehearing (R. 47). The petition for rehearing thus left pending for consideration by the Court of Appeals was denied by order of that Court entered on December 21, 1950 (R. 48). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. In Section 338 of the Nationality Act of 1940, Congress provides for the setting aside and revoking of citizenship under a detailed procedure therein laid down which provides safeguards for the citizen whose citizenship is attacked. The first and main question presented is whether Section 338 of the Nationality Act is exclusive and hence compulsory upon the Government for valid revocation of citizenship.

2. If the first and main question were answered in the negative, a second question would be presented: Whether the revocation of petitioner's citzenship obtained upon a motion filed, served, heard and decided upon the same day when petitioner was away from home, under military arrest and without counsel was void under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments.

STATUTE INVOLVED.

Section 338 of the Nationality Act of 1940, 8 U. S. C. 738, 54 Stat. 1158, provides that:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of

section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place ~~where~~ such suit is brought."

STATEMENT OF THE CASE.

The facts are not in dispute. As largely alleged in petitioner's complaint in the District Court, and admitted upon respondents' motion to dismiss, the pertinent facts may be simply summarized as follows:

Petitioner, Peter Bindczyck (pronounced as if spelled "Binchick"), became a citizen of the United States by naturalization in the Circuit Court of Frederick County, Maryland, on December 2, 1943, and his certificate of naturalization was duly issued by that court. (R. 3).

Petitioner has never lost his United States citizenship by expatriation or otherwise. And the order of the Circuit Court of Frederick County admitting petitioner to citizenship has never been revoked and set aside pursuant to the provisions of Section 338 of the Nationality Act of 1940. (R. 3).

In Section 338 of the Nationality Act of 1940, 8 U. S. C. Sec. 738, the Congress laid down a detailed procedure for proceedings to revoke and set aside an order admitting a person to citizenship and to cancel the certificate of natural-

ization issued. In paragraph (a) of that Section, the Congress specified *first:* who shall institute such proceedings —the United States District Attorney; *second:* what shall move the United States District Attorney to institute such proceedings—an affidavit showing good cause; *third:* what courts shall have jurisdiction to handle such proceedings—those courts which have jurisdiction to naturalize aliens; *fourth:* where such proceedings shall be brought—in the judicial district where the naturalized citizen resides at the time of bringing suit against him to revoke his citizenship; and *fifth:* the grounds upon which an order admitting to citizenship shall be revoked and the certificate of naturalization cancelled—two grounds specified, fraud and illegal procurement.

In a separate paragraph (b) of Section 338 Congress specified *sixth:* the extent and type of notice to the citizen whose naturalization is alleged to have been fraudulently or illegally procured—the citizen "shall . . . have sixty days' personal notice in which to make answer to the petition of the United States." And finally, the Congress specified, too, the mode and detail of service upon the citizen in the event of his absence from the judicial district of residence.

On December 9, 1943, a motion was filed in the proceeding in the Circuit Court of Frederick County, Maryland, in which petitioner had been naturalized (R. 5; 19). The motion was "to vacate and set aside the order of admission" of petitioner "to citizenship." The motion purported to be "on behalf of the United States Government" (R. 19); but was in no sense the "institution of proceedings" by a "petition of the United States." See Section 338 of the Nationality Act of 1940. The motion was not signed and filed by the United States District Attorney for the judicial district in which Frederick County, Maryland, is located, as required by Section 338. So far as appears from the record, the United States District Attorney was never consulted, or, if consulted, declined to file and prosecute any such motion. The motion was signed and filed by

someone by the name of Cook, a "naturalization examiner of the Immigration and Naturalization Service, Washington, D. C." (R. 19-20). At the time of the filing of the motion, petitioner, a soldier in the United States armed forces, was under military arrest at Camp Ritchie, Maryland; but his residence was and is New York. (R. 3; 6; 12; 14). The motion apparently was accompanied by an affidavit executed by a corporal; but whether in accordance with Section 338 the affidavit would have shown "good cause" to a United States District Attorney had there been one is doubtful; for the affidavit (R. 11-12) in one short paragraph merely sets forth what petitioner was supposed to have said to two commissioned officers (who were available, R. 15), in conversations lasting over one hour and a half. The corporal did not indicate the source of such knowledge.

Section 338 requires sixty days' notice of proceedings to revoke and set aside an order of citizenship. The motion to revoke and set aside the order admitting petitioner to citizenship was served, filed, heard, and decided on the same day, December 9, 1943. (R. 5; 13 ff.). The Circuit Court of Frederick County on that day entered an order vacating and setting aside the order which had admitted appellee to citizenship and cancelling his certificate of naturalization. The ground of such action is stated in neither the motion (R. 13; 19-20), nor the court's order (R. 20); although, admittedly, the general atmosphere of the proceedings (R. 11-20) would indicate that what Cook had in mind was something in the nature of fraud.

The motion and order thereon vacating and setting aside petitioner's citizenship did not comply with Section 338. (R. 5-6). The respondents concede the non-compliance (R. 6). Nevertheless, as the officials of the Government concerned with the deportation of aliens, they rely on the order which ignored Section 338, and insist on deporting petipetitioner as an alien (R. 4-5; 6).

Such deportation and denial of petitioner's citizenship would deprive him of the following rights and privileges of a citizen and national of the United States: (1) the right

to live in the United States, his home ever since 1938; (2) the right to pursue happiness in the midst of his family, consisting of his wife, child, and close blood relatives of his wife; and since they are all native-born American citizens to remain with them in the United States; (3) the right to support his wife and child in the United States by pursuing his lawful occupation of tool worker and designer; (4) the privilege of voting in United States elections; and (5) the right to be free of the application to him of statutes, rules and procedures which pertain solely to aliens. (R. 4).

Hence, petitioner began this proceeding in the District Court by suit against respondents, all agency heads in the Department of Justice concerned with deportation of aliens.[1] The suit sought a judgment declaring petitioner to be a citizen national of the United States. Such suit is expressly authorized by Section 503 of the Nationality Act of 1940, 8 U. S. C. 903.

The District Court was of the view that Section 338 of the Nationality Act of 1940 is exclusive in providing the only method for setting aside and revoking citizenship. Hence, the District Court granted petitioner summary judgment declaring him to be a national and citizen of the United States (R. 20-21). Such judgment was expressly stated to be "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940" (R. 21).

Our defense to the assertion of fraud in petitioner's naturalization still awaits the institution of Section 338 proceedings which provide the opportunity for the taking of counsel and the preparation of a defense. It is an odd kind of fraud that can be attempted to be proven only with the elimination of all opportunity to be at liberty, to take counsel, to know one's rights, to know the consequences of action or non-action, to prepare a defense, to have the time

[1] The agency heads orginally included Mr. Justice Clark, who was then Attorney General. Respondent J. Howard McGrath has since been substituted for Mr. Justice Clark.

to recover from serious mental and emotional disturbance and to think true and act calmly. But the respondents appealed from the order of the District Court.

The Court of Appeals reversed with instructions to the District Court to dismiss petitioner's complaint (R. 33).

The Court of Appeals was of the following view: If Cook, the naturalization examiner, had "purported to have acted pursuant to the provisions of [Section 338]" the Court would not have hesitated to affirm the District Court judgment in petitioner's favor, for, as the Court observed "the authorities are abundantly clear in denying the allowance of the order vacating and setting aside a naturalization where the strict letter of section 338 as laid down by Congress is not followed" (R. 25). However Cook did not "purport" to follow Section 338, and hence, the Court below said, that Section did not preclude the setting aside of petitioner's naturalization on a motion filed within the same term as the naturalization (R. 26; 32). The Court disposed of the serious, constitutional question resulting from its view by stating that petitioner waived his constitutional rights, apparently in the argument of his counsel before the Court (R. 24).

A petition to rehear (R. 35-43) attacked substantial errors (in our view) in the Court's decision; insisted that the record does not show that the setting aside of petitioner's naturalization was in the same term as his naturalization; and denied any waiver of the constitutional question. The petition to rehear was denied without opinion (R. 45; 48).

REASONS FOR GRANTING THE WRIT.

1. **The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals.**—The Court below held that without regard to Section 338 of the Nationality Act of 1940, a naturalized citizen can lose his citizenship upon motion filed in the naturalizing court within the same term as the naturalization. The Court of Ap-

peals for the Seventh Circuit, upon facts practically identical with ours, holds precisely the opposite. *United States ex rel. Volpe* v. *Jordan*, 161 F. (2) 390 (C.C.A. 7th, 1947). There the Court holds that Section 338 is exclusive for the setting aside of citizenship, and specifically that statutory or court rules as to setting aside of judgments within a term are irrelevant for, as in all matters of naturalization, the power to revoke naturalization must stem from the Congress. The Court below recognizes the *Volpe* case as a "clear authority" (R. 27) in petitioner's favor.

The Court below denies that it is otherwise in conflict with any decision (R. 26-27). We respectfully urge, nevertheless, a conflict between the decision below and the following decisions of the Second, Third, Fifth, and Seventh Circuit Courts of Appeal: *U. S.* v. *Watkins*, 168 F. (2) 883 (C.C.A. 2nd, 1948); *U. S.* v. *Stabler*, 169 F. (2) 995 (C.C.A. 3rd, 1948); *U. S.* v. *Kiriaze*, 172 F. (2) 1000 (C.C.A. 5th, 1949); *U. S.* v. *Sotis*, 131 F. (2) 783 (C.C.A. 7th, 1942); and *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2) 935 (C.C.A. 7th, 1943), cert. den. 327 U. S. 781. In those cases, the Government, in obtaining or seeking revocation of naturalization, had generally complied with the requirements of Section 338. The question was the necessity for compliance with one particular detail of Section 338 omitted by the Government, or asserted by the defending citizen to have been omitted by the Government. In each of those cases the Court held revocation valid only if the requirements of Section 338 had been met down to the last detail.[2] The Court below recognizes the validity of those cases (R. 26); but seeks to distinguish them on the ground that, whereas in those cases the Government sought to comply

[2] In the *Sotis*, *Watkins*, and *Kiriaze* cases (cited in the text) revocations of citizenship previously obtained by the Government were struck down for want of strict compliance with Section 338. The *Harrington* and *Stabler* decisions applied the same requirement of strict compliance with Section 338, and upheld the revocations of citizenship there involved because strict compliance with Section 338 was found.

with Section 338, here the Government ignored Section 338 altogether. As the Court below put it, Cook, the naturalization examiner, did not "purport to have acted pursuant to the provisions of" Section 338 (R. 25). The distinction raises more problems inviting review by this Court than it avoids; for if the distinction be valid two startling doctrines result which negate the whole development and trend of the law on the obligations of Government officials and the abandonment of medieval requirements in pleading. The two doctrines are: first, the disturbing concept that federal Government officials are less bound to comply with a federal statute if they ignore it completely rather than only in part; and second, a doctrine of labels which teaches that questions of American citizenship are to turn upon whether or not the moving papers are expressly designated to be pursuant to a federal statute. However, in our view, the distinction offered by the Court below is without substance; and its decision does conflict with the decisions in four circuits which we have cited in this paragraph.[3]

2. **The federal question presented as to the applicability of the safeguards of Section 338 to all revocation of citizenship is of general importance.**—Petitioner's citizenship was revoked on notice of less than one day and in disregard of all the safeguards provided in Section 338. Such action does not appear to have been a "sport" in the administration of our citizenship law. The respondents, although they lost in the District Court, appealed and continued to insist on a right to revoke citizenship without regard to Section 338. They still so insist.

The reported decisions passing upon the obligation of the Government to comply with Section 338 are not so many (see Point 1, *supra*). However, in ordering peti-

[3] In accord with the cited decisions of the Courts of Appeal in the Second, Third, Fifth and Seventh Circuits is a District Court decision in the Tenth Circuit, *U. S.* v. *Gronich*, 211 Fed. 548 (W. D. Wash., 1914); and see *U. S. ex. rel. Lapides* v. *Watkins*, 165 F. (2) 1017 (C. C. A. 2nd, 1948).

tioner deported, respondent, Thomas G. Finucane, insisted that the Government, without observing the safeguards of Section 338, has in a number of cases obtained revocation of citizenship granted in the same term. That these actions in disregard of Section 338 are not reported is not surprising. Petitioner pursues this three-tier litigation because denaturalization for him threatens deportation and the loss of country, home and family (all that makes life worthwhile), and because he has been able to obtain counsel. But usually a citizen of the United States is not subject to deportation on revocation of his citizenship and has neither the money, nor the legal advice requisite for a protracted contest. Hence the lack of reported cases on the Government's methods for revoking citizenship in disregard of Section 338.

In a very real sense, petitioner represents the rights of all our citizens, recently naturalized; and we respectfully suggest review here to determine whether in dealing with this group of our citizens, who most need protection, the Government, too, is required "to turn a square corner".

3. **The Court below decided a federal question in a way probably in conflict with applicable decisions of this Court.**—We recall as to revocation of citizenship that "in its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty". *Schneiderman* v. *U. S.*, 320 U. S. 118, 122. A revocation suit "is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status." *Schneiderman* v. *U. S.*, just *supra* at p. 160; *Baumgartner* v. *U. S.*, 322 U. S. 665, 675. The constitutionality of the jurisdiction to revoke citizenship conferred by Section 338 was sustained by this Court with the observation that such jurisdiction to revoke is conferred only "under conditions affording to the party whose rights are brought into question full opportunity to be heard". *Johannessen* v. *U. S.*, 225 U. S. 227, 241. For such reasons, this Court firmly interprets Section 338 as requiring the

Government to produce "clear, unequivocal, and convincing evidence which does not leave the issue in doubt" before citizenship can be revoked. *Knauer* v. *U. S.*, 328 U. S. 654, 657; *Schneiderman* v. *U. S.*, 320 U. S. 118, 123, 125; *Baumgartner* v. *U. S.*, 322 U. S. 665, 670.

The *Knauer-Schneiderman-Baumgartner* doctrine rather plainly demands the striking down of the purported revocation of petitioner's citizenship. The procedure that rushed petitioner to loss of citizenship on hearsay and questionable evidence (R. 11-19) in less than a day, and without the opportunity afforded to him to take counsel and prepare a defense, does not square with the extreme protection of the citizen required by the *Knauer, Schneiderman,* and *Baumgartner* decisions. Cf. *U. S.* v. *Kiriaze,* 172 F. (2d) 1000, 1002 (C.C.A. 5th, 1949).

Admittedly, this Court's decisions in *Knauer, Schneiderman* and *Baumgartner* were concerned with revocation proceedings expressly brought by the Government under Section 338. Here the revocation proceeding was not designated as under Section 338. But the reasons for the *Knauer-Schneiderman-Baumgartner* protection of our citizens are applicable to revocation of citizenship under any label. And, if the letter and the spirit of that protection were applicable only to Section 338 proceedings, there would be little point to those decisions; for the protection could be eliminated by merely ignoring Section 338, as in petitioner's case.

Finally, in naturalization matters, whether the matter be revocation or grant, the procedures enacted by Congress are controlling. That rule is indubitably established on the grant side by decisions of this Court. *U. S.* v. *Ginsberg,* 243 U. S. 472 (statutory provision for naturalization hearing in "open court" requires precisely such a hearing, and naturalization conferred upon a hearing held partially "in chambers" was rightly revoked in Section 338 proceedings); *Maney* v. *United States,* 278 U. S. 17 (statutory provision for the Government's protection of ninety days no-

tice to the Government of naturalization hearing requires no less than ninety days, and naturalization conferred upon seventy days notice of naturalization hearing was rightly revoked in Section 338 proceedings); see *Baumgartner* v. *U. S.*, 322 U. S. 665, 672 (all statutory conditions for naturalization must be satisfied). With specific reference to the naturalization statute this Court has taught that: "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect to a matter so vital to the public welfare". *U. S.* v. *Ginsberg, supra* at page 474.

Since statutory procedures are controlling for the grant of naturalization, they also control the revocation of naturalization. See the *Volpe, Watkins, Stabler, Kiriaze, Sotis* and *Harrington* decisions, all cited *supra* in Point 1. If, for example, the Government must have its ninety-days notice of naturalization hearing even though the seventy-days notice it did get prejudiced it not (the *Maney* case in this Court), then a citizen of the United States must have his sixty-days notice of revocation of naturalization hearing when the notice of less than one day he did get prejudiced him severely (petitioner's case). Grant and revocation are but two sides of the same coin. The legislative will with respect to both, so vital to the public welfare, is equally compelling. Compare *Ginsberg* and *Maney* on the grant side with *Schneiderman, Baumgartner* and *Knauer* on the revocation side, all decisions of this Court, cited *supra*.

We claim a conflict between the decision below and this Court's decisions in *Ginsberg, Maney, Schneiderman, Baumgartner* and *Knauer*. The urging of this Court's decisions upon the Court below met with silence.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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ISIDORE ENGLANDER,
New York City, New York.

Washington, D. C.,
March, 1951.

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OCTOBER TERM, 1951.

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BRIEF FOR PETITIONER.

JOSEPH A. FANELLI,
ISIDORE ENGLANDER,
Counsel for Petitioner.

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QUESTIONS PRESENTED.

1. In Section 338 of the Nationality Act of 1940, Congress provides for the setting aside and revoking of citizenship under a detailed procedure therein laid down which provides safeguards for the citizen whose citizenship is attacked. The first and main question presented is whether Section 338 of the Nationality Act is exclusive and hence compulsory upon the Government for valid revocation of citizenship.

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Petitioner, Peter Bindczyck (pronounced as if spelled "Binchick"), became a citizen of the United States by naturalization in the Circuit Court of Frederick County, Maryland, on December 2, 1943, and his certificate of naturalization was duly issued by that court. (R. 3).

Petitioner has never lost his United States citizenship by expatriation or otherwise. And the order of the Cir-

cuit Court of Frederick County admitting petitioner to citizenship has never been revoked and set aside pursuant to the provisions of Section 338 of the Nationality Act of 1940. (R. 3).

In Section 338 of the Nationality Act of 1940, 8 U. S. C. Sec. 738, the Congress laid down a detailed procedure for proceedings to revoke and set aside an order admitting a person to citizenship and to cancel the certificate of naturalization issued. In paragraph (a) of that Section, the Congress specified *first*: who shall institute such proceedings—the United States District Attorney; *second*: what shall move the United States District Attorney to institute such proceedings—an affidavit showing good cause; *third*: what courts shall have jurisdiction to handle such proceedings—those courts which have jurisdiction to naturalize aliens; *fourth*: where such proceedings shall be brought—in the judicial district where the naturalized citizen resides at the time of bringing suit against him to revoke his citizenship; and *fifth*: the grounds upon which an order admitting to citizenship shall be revoked and the certificate of naturalization cancelled—two grounds specified, fraud and illegal procurement.

In a separate paragraph (b) of Section 338 Congress specified *sixth*: the extent and type of notice to the citizen whose naturalization is alleged to have been fraudulently or illegally procured—the citizen "shall . . . have sixty days' personal notice in which to make answer to the petition of the United States." And finally, the Congress specified, too, the mode and detail of service upon the citizen in the event of his absence from the judicial district of residence.

On December 9, 1943, a motion was filed in the proceeding in the Circuit Court of Frederick County, Maryland, in which petitioner had been naturalized (R. 5, 19). The motion was "to vacate and set aside the order of admission" of petitioner "to citizenship." The motion purported to be "on behalf of the United States Govern-

ment" (R. 19); but was in no sense the "institution of proceedings" by a "petition of the United States." See Section 338 of the Nationality Act of 1940. The motion was not signed and filed by the United States District Attorney for the judicial district in which Frederick County, Maryland, is located, as required by Section 338. So far as appears from the record, the United States District Attorney was never consulted, or if consulted, declined to file and prosecute any such motion. The motion was signed and filed by someone by the name of Cook, a "naturalization examiner of the Immigration and Naturalization Service, Washington, D. C." (R. 19-20). At the time of the filing of the motion, petitioner, a soldier in the United States armed forces, was under military arrest at Camp Ritchie, Maryland; but his residence was and is New York. (R. 3; 6; 12; 14). The motion apparently was accompanied by an affidavit executed by a corporal; but whether in accordance with Section 338 the affidavit would have shown "good cause" to a United States District Attorney had there been one is doubtful; for the affidavit (R. 11-12) in one short paragraph merely sets forth what petitioner was supposed to have said to two commissioned officers (who were available, R. 15), in conversations lasting over one hour and a half. The corporal did not indicate the source of such knowledge.

Section 338 requires sixty days' notice of proceedings to revoke and set aside an order of citizenship. The motion to revoke and set aside the order admitting petitioner to citizenship was served, filed, heard and decided on the same day, December 9, 1943. (R. 5; 13 ff.). The Circuit Court of Frederick County on that day entered an order vacating and setting aside the order which had admitted petitioner to citizenship and cancelling his certificate of naturalization. The ground of such action is stated in neither the motion (R. 13; 19-20), nor the court's order (R. 20); although, admittedly, the general atmosphere of the proceedings (R. 11-20) would indicate

that what Cook had in mind was something in the nature of fraud.

The motion and order thereon vacating and setting aside petitioner's citizenship did not comply with Section 338. (R. 5-6). The respondents concede the non-compliance (R. 6). Nevertheless, as the officials of the Government concerned with the deportation of aliens, they rely on the order which ignored Section 338, and insist on deporting petitioner as an alien (R. 4-5; 6).

Such deportation and denial of petitioner's citizenship would deprive him of the following rights and privileges of a citizen and national of the United States: (1) the right to live in the United States, his home ever since 1938; (2) the right to pursue happiness in the midst of his family, consisting of his wife, child, and close blood relatives of his wife; and since they are all native-born American citizens to remain with them in the United States; (3) the right to support his wife and child in the United States by pursuing his lawful occupation of tool worker and designer; (4) the privilege of voting in United States elections; and (5) the right to be free of the application to him of statutes, rules and procedures which pertain solely to aliens. (R. 4).

Hence, petitioner began this proceeding in the District Court by suit against respondents, all agency heads in the Department of Justice concerned with deportation of aliens.[1] The suit sought a judgment declaring petitioner to be a citizen national of the United States. Such suit is expressly authorized by Section 503 of the Nationality Act of 1940, 8 U. S. C. 903.

The District Court was of the view that Section 338 of the Nationality Act of 1940 is exclusive in providing the only method for setting aside and revoking citizenship. Hence, the District Court granted petitioner summary judgment declaring him to be a national and citizen

[1] The agency heads originally included Mr. Justice Clark, who was then Attorney General. Respondent J. Howard McGrath has since been substituted for Mr. Justice Clark.

of the United States (R. 20-21). Such judgment was expressly stated to be "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940" (R. 21).

Our defense to the assertion of fraud in petitioner's naturalization still awaits the institution of Section 338 proceedings which provide the opportunity for the taking of counsel and the preparation of a defense. It is an odd kind of fraud that can be attempted to be proven only with the elimination of all opportunity to be at liberty, to take counsel, to know one's rights, to know the consequences of action or non-action, to prepare a defense, to have the time to recover from serious mental and emotional disturbance and to think true and act calmly. But the respondents appealed from the order of the District Court.

The Court of Appeals reversed with instructions to the District Court to dismiss petitioner's complaint (R. 33).

The Court of Appeals was of the following view: If Cook, the naturalization examiner, had "purported to have acted pursuant to the provisions of [Section 338]" the Court would not have hesitated to affirm the District Court judgment in petitioner's favor, for, as the Court observed "the authorities are abundantly clear in denying the allowance of the order vacating and setting aside a naturalization where the strict letter of section 338 as laid down by Congress is not followed" (R. 25). However Cook did not "purport" to follow Section 338, and hence, the Court below said, that Section did not preclude the setting aside of petitioner's naturalization on a motion filed within the same term as the naturalization (R. 26; 32). The Court disposed of the serious, constitutional question resulting from its view by stating that petitioner waived his constitutional rights, apparently in the argument of his counsel before that Court (R. 24).

A petition to rehear (R. 35-43) attacked substantial errors (in our view) in the Court's decision; insisted that

the record does not show that the setting aside of petitioner's naturalization was in the same term as his naturalization; and denied any waiver of the constitutional question. The petition to rehear was denied without opinion (R. 45; 48).

In requesting a writ of certiorari, petitioner presented both the statutory and the constitutional questions concerning the invalidity of the revocation of his citizenship. The Court granted certiorari without limitation (R. 36).

SPECIFICATION OF ERRORS TO BE URGED.

We urge that the court below erred:

1. In failing to hold that the revocation of petitioner's citizenship was invalid for lack of compliance with Section 338 of the Nationality Act of 1940.

2. After making the first error urged, in failing to pass upon the constitutional questions involved to hold the revocation of petitioner's citizenship invalid under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments.

3. In holding that citizenship may, without compliance with Section 338, be revoked in the same term of court as the grant of citizenship revoked.

4. After making the third error urged, in holding the revocation of petitioner's citizenship valid as made within the same court term as the grant of his citizenship, although the necessary fact of same term is assumed and not proven in the record.

5. In failing to affirm the judgment of the District Court declaring petitioner to be a citizen of the United States.

SUMMARY OF ARGUMENT.

Congress in Section 338 of the Nationality Act provided a code of procedure for the cancelling of naturalization. The "cancelling" of petitioner's naturalization, relied upon by respondents, completely ignored the provisions of Section 338 and was therefore void. Section 338 is obligatory for valid cancellation. It is so held in all circuits in which the question has arisen—those being the Seventh, Third, Second, Fifth and Tenth Circuits. Beyond that, it is well-settled that in naturalization matters, whether in the granting or cancelling of naturalization, the statutory procedures provided by Congress are obligatory.

The foregoing judicial precedents but enforce the intent of Congress, plain on face of statute and in legislative history, to make its naturalization provisions in general, and Section 338 in particular, exclusive in order to secure uniformity.

If there be doubt of this, a constitutional question as to uniformity would require construction of Section 338 as exclusive.

Apart from Section 338, the cancelling of petitioner's naturalization was void for want of due process. He did not get reasonable notice and opportunity to be heard.

ARGUMENT.

A. The Revocation of Petitioner's Citizenship Was Invalid for Want of Compliance With Section 338 of the Nationality Act of 1940.

There is no question that the Circuit Court of Frederick County, in its order revoking and setting aside petitioner's citizenship and cancelling his certificate, covered precisely the ground covered by Section 338 of the Nationality Act, albeit without observing the procedural safeguards required by that Section. Was it the intent of Congress in passing Section 338 to require that its

provisions be observed in all cases of revoking and setting aside of citizenship—that is the basic question here.[2]

1. *The intent of Congress to make Section 338 compulsory upon the government is reasonably plain upon the face of that section when considered in the light of common sense.*—That Congress provided in Section 338 for the institution of revocation proceedings by the appropriate United States Attorney, and nevertheless intended for such power to exist in a naturalization examiner is not likely. And that improbability becomes even less likely in the light of a significant circumstance. Section 338 is a reenactment of Section 15 of the Naturalization Act of 1906, 8 U. S. C. (1934 ed.) 405, 34 Stat. 601. Section 338 differs from its predecessor, Section 15 of the 1906 Naturalization Act, in but one material respect. Section 15 provided for the institution of proceedings by the United States Attorney *or* the Commissioner of Naturalization *or* the Deputy Commissioner of Naturalization. In enacting Section 338, the Congress deliberately eliminated the Commissioner and Deputy Commissioner

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[2] That the intent of Congress controls the question here is clear, at least to us. Congress has the constitutional power "to establish a uniform rule of naturalization", and, in that connection, exclusive power over all matters of naturalization—granting and revoking of citizenship, and the procedure therefor. The Constitution, Art I, Sec. 8, cl. 4; *Baumgartner* v. *U. S.*, 322 U. S. 665; *U. S.* v. *Ginsberg*, 243 U. S. 472. In the opinion of the Court below, R. 25, there is the suggestion that Congress may lack "the power" to bar the procedures by which petitioner's citizenship was set aside in the Circuit Court of Frederick County. The suggestion is plainly wrong. *Knauer* v. *U. S.*, 328 U. S. 654, 673; *Luria* v. *U. S.*, 231 U. S. 9; *Johannessen* v. *U. S.* 225 U. S. 227; *Grahl* v. *U. S.*, 261 Fed. 487 (CCA 7th, 1919); *U. S.* v. *Mansour*, 170 Fed. 671 (S. D. N. Y., 1908), aff'd 226 U. S. 604.

There are some doubts as to the constitutionality of Section 338. But they do not lie in the direction of questioning the power of Congress to bar the star-chamber type of proceeding used in purported cancellation of petitioner's citizenship. To the contrary, a minority of the Justices of the Supreme Court have believed Section 338 to be unconstitutional on two quite different grounds. They doubt the power of Congress to authorize cancellation of citizenship for the naturalized citizen when none is authorized for the native-born. The Constitution, they say, provides for but one class of citizen, equal in all the rights and liabilities of citizenship, except eligibility for the Presidency. Further, they doubt the sufficiency of the safeguards contained in Section 338 to insure the fair hearing required by due process. See *Knauer* v. *U. S.*, 328 U. S. 654, 676, 677, 678.

These constitutional difficulties should lead to the resolution of doubts in favor of petitioner if there be any serious question of the applicability of Section 338 to all proceedings for cancellation.

of Naturalization and confined the power of instituting proceedings to the United States Attorney. It is extremely unlikely that Congress saw fit to take such power away from the Commissioner and Deputy Commissioner but nevertheless intended to have such power in their subordinate naturalization examiners.

Nor is it likely that Congress in Section 338 provided for sixty days' personal notice to the citizen, thus safeguarding the opportunity for his defense, and yet intended that notice of less than a day could effect revocation of citizenship.

But in Section 338 and in its predecessor, Section 15 of the 1906 Act, Congress did not stop with specifying the public official charged with responsibility for revocation suits and the extent of notice to be given. Congress set forth, and defined and delimited, a complete procedure for revocation down to the very details of who shall bring suit for revocation; on what evidence of "good cause"; on what grounds; in what types of courts and where; by what kind and length of notice; and by what kind of service on the citizen. Surely, it is most unlikely that Congress spelled out all of these specifications for naught because it had an intention at the same time to permit citizenship to be revoked by a procedure opposed at practically every point to the provisions of Section 338.

In Section 338, the Congress achieved a nice, working balance between the protection of the Government against citizenship fraudulently or illegally procured and the safeguarding of the citizen against unfair or hurried loss of his citizenship. For the equitable balance so worked out by Congress, petitioner got the imbalance of a procedure worked out by a naturalization examiner and lacking even in the rudiments of due process (see Point B, *infra*). It is almost absurd to believe that such could have been the intention of Congress in working out the equitable balance enacted in Section 338.

Section 338 with its finely delimited procedures and nicely balanced protection of Government and citizen alike was enacted by Congress as part of the Nationality Act of 1940. Congress intended it to be part of "an act to revise and codify the nationality laws of the United States into a comprehensive nationality code" (such is the very title of the Nationality Act). To urge that Congress, nevertheless, did not intend the part of its "comprehensive code" which sets forth a code of procedure for cancellation of nationality, to be an exclusive "revision and codification", makes little sense.

It is possible that Congress in enacting Section 338 was idling away its time in providing procedures and safeguards to be observed only at the Government's convenience. And possibly Congress did not intend a "comprehensive code" to be "comprehensive", even though the Congress expressly stated its intention to have "a comprehensive code". However, the establishing of possibilities so unlikely in the expectations of common sense requires of respondents the support of persuasive judicial authorities and clear evidences of such legislative intent. *Cf.* Jackson, J., concurring in *U. S.* v. *Spelar*, 338 U. S. 217, 225: "While Congressional incoherence of thought or of speech is not unconstitutional, . . . we should pay Congress the respect of not assuming lightly that it indulges in inconsistencies of speech which make the English language almost meaningless".

There are persuasive judicial authorities and clear evidences of the legislative intent. But as one would, in common sense, expect, and as we urge, they all prove the intention of Congress to require compliance with its provisions in Section 338 for the cancelling of citizenship.

2. *The intent of Congress to make Section 338 compulsory upon the Government is shown by the legislative history of that section.*—The Naturalization Act of 1906, 8 U. S. C. (1934 ed.) Sec. 352 ff., is the predecessor of our present Nationality Act of 1940; and Section 15 of the

Act of 1906 is the almost identical forerunner of our Section 338 of the Nationality Act.[3] The legislative history of both statutes shows the intention of Congress to provide uniform and exclusive methods for the granting and cancelling of naturalization.

In passing the Act of 1906, the Congress was acutely aware of its exclusive power over all matters of naturalization and aware also that the constitutional condition on the exercise of that exclusive power is uniformity. The Constitution, Art. I, Sec. 8, cl. 4. Indeed, the Congress considered uniformity essential not only because of the constitutional limitation upon its power but also because of the abuses to be remedied by the proposed Act of 1906. The absence of statutory details to prescribe a uniform procedure on both the granting and cancelling side of naturalization had previously led to loose and sketchy procedures resulting in grave frauds.[4]

The abuses to be remedied in naturalization matters "resulted", said both the Senate and House Committees on the proposed Act of 1906, "more from lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases." And, hence, "in order to correct the abuses that have been disclosed it is imperative in the judgment of your committee, that a law should be enacted prescribing a fixed and uniform system and a code of procedure in naturalization matters." See Sen. Rep. 4373, pp. 1-2; House Rep. 1789, pp. 1-2; and House Rep. 5075; all on H. R. 15442 (the Act of 1906), 59th Congress, 1st Session.

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[3] We say "*almost* identical" because Congress in Section 338 saw fit to take away from the Commissioner and Deputy Commissioner of Naturalization the authority those officials formerly had under Section 15 of the Act of 1906 to institute proceedings for cancellation. See the discussion at p. 10, supra.

[4] For judicial descriptions of the loose procedures and frauds brought to the attention of Congress in its passage of the Act of 1906 see *U. S.* v. *Lenore.*, 207 Fed. 865, 867 (D. C. N. Dak., 1913); and *U. S.* v. *Kusche*, 56 F. Supp. 201, 220-221 (S. D. Cal., 1944).

Representative Bonynge, who was in charge of the proposed legislation on the floor of the House, explained the full intent and purport of the Act of 1906 thus:

> "It does provide for a general and a uniform system of naturalization to be enforced throughout the United States" (40 Cong. Rec. 3640.)

And, with specific reference to the cancellation provision of the proposed 1906 Act, which is now Section 338 of the Nationality Act, Representative Bonynge, House Manager of the proposed 1906 Act, explained:

> "It provides a procedure for the cancellation of certificates of naturalization that may be obtained through fraud of any kind. * * * The procedure can be put under one head as one feature of the bill. I think that is a very, very important feature; that we should exercise the authority given to us by the Constitution of the United States to establish—to use the exact language of the Constitution—'to establish a uniform rule of naturalization.' That this bill does; and I think it is very important." (40 Cong. Rec. 3651.)

See also to the same effect, the statement of Representative Hughes in support of the proposed legislation, 40 Cong. Rec. 7044; and *Luria* v. *United States*, 231 U. S. 9.

So the Act of 1906 was not intended to change policy in substantive matters but rather to "provide a fixed and uniform system and code of procedure in naturalization matters to be enforced throughout the United States." See Sen. Rep. 4373, pp. 1-2, *supra;* the Statement of Bonynge, House Manager on the Act of 1906, *supra*; *Tutun* v. *U. S.*, 270 U. S. 568, 579-580; and *Ozawa* v. *United States*, 260 U. S. 178, 190. And part of that fixed and uniform code of procedure to be enforced throughout the United States were the proceedings for cancellation set forth in Section 15. The Manager of the proposed 1906 Act took pains to point that out specifically (see his full

statement on the subject, *supra*); and see *U. S.* v. *Kusche*, 56 F. Supp. 201, 222 (S. D. Cal., 1944).

The Act of 1906 did provide such a system of fixed and uniform procedure to be enforced throughout the nation both in the granting and cancelling of citizenship. That is apparent from the provisions of the Act of 1906. In considerable detail, the Act prescribes the mode and manner of obtaining naturalization—the forms to be used; the oath to be administered; and the fees to be collected; and the mode and manner of cancelling naturalization—the type of proceeding; the officer empowered to prosecute; the courts empowered to cancel; the length and type of notice; and the method and type of service.

Yet the Executive and the Congress found that the Act of 1906 did not provide sufficient detail and was not comprehensive enough to secure uniformity in naturalization matters. Hence, the Nationality Act of 1940. The Nationality Act was drafted to meet the "need for an accurate, comprehensive, and detailed code by which naturalization is to be conferred and any abuse of the process remedied." *Statement of the Secretaries of State and Labor and the Attorney General (Cummings, Hull, and Perkins) in submitting the draft of the Nationality Act*, 86 Cong. Rec. 11945. And more explicitly with relation to revocation, the cabinet heads explained: "No alien has the slightest right to naturalization unless all statutory requirements are complied with, and every certificate of citizenship must be treated as granted on condition that the Government may challenge it in regular proceedings for the purpose and demand its revocation unless issued in accordance with statutory requirements. The proposed code, herewith, represents a studied effort to draft a measure which would conform to the constitutional requirement that the rule of naturalization be 'uniform'." id. The Congress pursued these objectives and, in passing the Nationality Act, "revised and codified the nationality laws of the United States into a comprehen-

sive nationality code" (Title of the Act), "containing in logical and systematic form a statement of all the laws of the United States" prescribing "the conditions under which citizenship of the United States may be acquired or lost." Sen. Rep. 2150, p. 2; House Rep. 3019, p. 3; House Rep. 2396, pp. 1-2; Statement of Rep. Rees, Chairman of the Committee on Immigration and Naturalization, 86 Cong. Rec. 11947; all on the proposed Nationality Act, H. R. 9980, 76th Cong., 3rd Sess.

The Nationality Act of 1940 in setting forth "all the laws of the United States prescribing the conditions under which citizenship of the United States may be acquired or lost" sets forth no law condoning the lack of safeguarding procedures by which petitioner's citizenship is asserted to have been lost. To the contrary, the only provision in the Nationality Act for cancellation of citizenship is Section 338. And in Section 338, as the Supreme Court has noted in sustaining the constitutionality of such a cancellation provision, jurisdiction to cancel is conferred only "under conditions affording to the party whose rights are brought into question full opportunity to be heard". *Johannessen* v. *U. S.*, 225 U. S., 227, 241.

All of the foregoing was once clear to the Government. Indeed, in the past, the Government was so impressed by the legislative evidences of the intent of Congress to make its cancellation provision exclusive that it urged such exclusivity against the validity of an appeal from a naturalization judgment. As Department of Justice counsel then stated: "The only method provided for attacking the findings of a court in naturalization is provided by [Section 15 of the Act of 1906], and then only on the part of the Government by suit to cancel on the grounds of fraud or illegality. This single method was supplied designedly by Congress . . ." See *State ex rel. Weisz* v. *District Court*, 61 Mont. 427, 431; 202 Pac. 387 (1921). But that was some decades ago when the intent

of Congress in passing Section 15 of the Act of 1906 was fresher in the minds of Government counsel.

This Court has not lost sight of the will evidenced by Congress to make its enactments on naturalization matters exclusive and compulsory. The Court has taught with specific reference to the naturalization statute that: "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *U. S.* v. *Ginsberg*, 243 U. S. 472, 474.

3. *The intent of Congress to make Section 338 compulsory upon the government is confirmed by well-settled precedent.*—The question of the validity of a cancellation of citizenship obtained without strict observation of the requirements of Section 338 (or its predecessor provision, Section 15 of the Naturalization Act of 1906) has been before the federal courts in seven decisions. All seven decisions hold such cancellation void. *U. S.* v. *Sotis*, 131 F. (2d) 783 (C.C.A. 7th, 1942); *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2d) 935 (C.C.A. 7th, 1943); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. (2d) 390 (C.C.A. 7th, 1947); *U. S.* v. *Stabler*, 169 F. (2d) 995 (C.C.A. 3rd, 1948); *U. S.* v. *Watkins*, 168 F. (2d) 883 (C.C.A. 2nd, 1948); *U. S.* v. *Kiriaze*, 172 F. (2d) 1000 (C.C.A. 5th, 1949); *U. S.* v. *Gronich*, 211 Fed. 548 (W. D. Wash., 1914); and see *U. S. ex rel. Lapides* v. *Watkins*, 165 F. (2d) 1017 (C.C.A. 2nd, 1948).[5]

[5] In the *Sotis*, *Jordan*, *Watkins*, and *Kiriaze* cases (cited in the text), cancellations of citizenship previously obtained by the Government were struck down for want of strict compliance with Section 338. The *Harrington* and *Stabler* decisions applied the same requirement of strict compliance with Section 338, and upheld the cancellations of citizenship there involved because strict compliance with Section 338 was found. In the *Gronich* case, a petition of the United States to cancel citizenship, which otherwise complied with Section 15 of the 1906 Act, was dismissed for failure to comply with the one statutory particular of residence.

The *Gronich* case was decided in 1914, only eight years after the enactment of Section 15 of the 1906 Act which first laid down the Congressional requirements now set forth in Section 338. Yet the Government made no argument then of jurisdiction in the court to cancel independently of the jurisdiction conferred by Section 15 of the 1906 Act.

The *Volpe* decision by the Seventh Circuit Court of Appeals held void a cancellation of citizenship which, like petitioner's cancellation, was obtained in complete disregard of Section 338. There cancellation was obtained upon a motion to cancel filed in the state naturalizing court within the same term as the naturalization. The *Volpe* decision is precise authority for our position.

But the *Sotis* and *Harrington* decisions of the Seventh Circuit Court of Appeals, the *Stabler* decision of the Third Circuit Court of Appeals, the *Watkins* decision of the Second Circuit Court of Appeals, the *Kiriaze* decision of the Fifth Circuit Court of Appeals, and the *Gronich* decision in the Tenth Circuit are *a fortiori* authorities here. For in those cases the Government, in obtaining or seeking cancellation, had generally complied with the requirements of Section 338 and the only question was the necessity for compliance with one particular detail of Section 338 omitted by the Government, or asserted by the defending citizen to have been omitted by the Government. Those decisions insisted on compliance with each detail of Section 338.[6] Here the Government purported to cancel petitioner's citizenship in complete disregard of Section 338.[7]

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[6] The *Stabler*, *Watkins*, *Harrington* and *Gronich* cases were concerned with failure of various kinds to follow the requirements of Section 338 as to the district in which cancellation suits may be brought. The *Sotis* and *Kiriaze* cases dealt with two different kinds of failures to observe the requirements of Section 338 as to service by publication in cancellation proceedings.

[7] The Court of Appeals recognizes the *Volpe* case as a "clear authority" (R. 27) in petitioner's favor. That court also accepts (R. 26) the validity of the whole line of cases, cited in the text, requiring complete compliance with Section 338 for effective cancellation. But that court offers a distinction—in those cases the Government sought to comply with Section 338, whereas here the Government ignored Section 338 altogether. As the Court of Appeals put it, Cook, the naturalization examiner, did not "purport to have acted pursuant to the provisions of" Section 338 (R. 25). If the distinction were valid, we would have two new and unwelcome concepts in our laws: That Federal Government officials are less bound to comply with a Federal statute if they ignore it completely rather than only in part; and that retention of the citizenship of an American is to turn upon whether the Government's pleadings are expressly labelled as filed pursuant to a Federal statute. But the distinction is, in our view, without substance. There would be no reason for the second, third, fifth, and seventh Circuit Courts of Appeal to insist upon scrupulous compliance with Section 338, if an independent jurisdiction to cancel existed.

For the sake of completeness, four additional federal court decisions supporting our position should be noted. *U. S.* v. *Kusche*, 56 F. Supp. 201 (S.D. Cal., 1944), *U. S.* v. *Lenore*, 207 Fed. 865 (D.C. N.Dak., 1913), and *U. S.* v. *Mansour*, 170 Fed. 671 (S.D. N.Y., 1908), aff'd 226 U. S. 604, teach that Section 338 (or its predecessor, Section 15 of the 1906 Act) governs proceedings to cancel citizenship. Jurisdiction to cancel derives from careful compliance with the provisions of that section; and no independent ground of jurisdiction is indicated. And finally there is *U. S.* v. *Ovens*, 13 F. (2d) 376 (C.C.A. 4th, 1926), which held that an unsuccessful motion by the Government to reopen a naturalization proceeding and cancel citizenship is not *res adjudicata* against the Government in a later and independent proceeding to cancel brought pursuant to Section 15 of the 1906 Act, even though the unsuccessful motion was contested and denied on the merits. The necessary rationale of the *Ovens* decision is that the proceeding on the motion to cancel in that case, like the proceeding on the motion to cancel in our case, was void for non-compliance with the statutory provisions governing cancellation of citizenship; for, otherwise, all the requirements of *res adjudicata* were present.

The decisions on the point establish the principle of no jurisdiction to cancel citizenship except in precise compliance with Section 338.

Moreover, that principle, itself, is but one aspect of a broader and well-settled principle of naturalization law—that in naturalization matters statutory procedures must be observed in meticulous detail.

The applicant, in seeking naturalization, and the Government, in seeking cancellation of naturalization, must strictly comply with the statutory provisions enacted by Congress. In naturalization law there are few, if any, permissive bagatelles. Whether it be a matter of conferring naturalization or cancelling naturalization, nothing of the slightest substance in the statute can be disregarded. So the

courts have uniformly held. For the aspect of this principle applicable to cancellation of naturalization, see the *Sotis, Harrington, Volpe, Stabler, Watkins, Kiriaze, Gronich, Lapides, Kusche, Lenore, Mansour,* and *Ovens* cases, all *supra.*

For the aspect of the same principle applicable to the obtaining of naturalization see: *Baumgartner* v. *U. S.*, 322 U.S. 665, 672 (all statutory conditions for naturalization must be satisfied); *U. S.* v. *Ginsberg,* 243 U.S. 472 (statutory provision for naturalization hearing in "open court" requires precisely such a hearing, and naturalization conferred upon a hearing held partially "in chambers" was rightly cancelled in Section 338 proceedings); *U. S.* v. *Vogel,* 262 Fed. 262 (C.C.A. 2nd, 1919) (applicant for citizenship did, in his oath, properly renounce his former allegiance to France. In error as to his former citizenship, applicant, in his declaration and petition renouncing all allegiances generally, had specifically renounced an allegiance to Germany. The Act of 1906 required specific renunciation of former allegiance at all three stages, declaration, petition, and final oath. The naturalization court entered a *nunc pro tunc* order correcting the declaration and petition. On appeal—held void. The lower court had no power to change, or to correct this statutory detail); *Petition of Cohen,* 53 F. (2d) 865 (S.D. N.Y., 1931) (in the absence of specific statutory power to do so, there is no power in naturalization court to correct inadvertent error in naturalization record concerning applicant's birth); see *U. S.* v. *Schwarz,* 82 F. Supp. 933, 936 (S.D. N.Y., 1949).

And see particularly *Maney* v. *United States,* 278 U. S. 17. The Naturalization Act of 1906 set the day of naturalization hearing ninety days after the filing of a petition for naturalization. A similar provision, limited to thirty days, is today contained in Section 334(c) of the successor statute, the Nationality Act of 1940. Such provision protects the Government by allowing time for the investigation of fraud or illegality. This Court held *Maney's* naturalization

bad because his petition was filed seventy and not ninety days before naturalization hearing as the statute required. The Government had lost twenty of the ninety days provided by Congress for its protection. Petitioner, Bindczyck, got none of the sixty days provided by Congress for his protection. What is sauce for the goose is sauce for the gander. *Maney's* naturalization was held bad for failure to comply strictly with a statutory provision allowing ninety days' notice to the Government. Cancellation of petitioner's naturalization was void for complete failure to comply with the statutory provision (Section 338) allowing petitioner sixty days' notice to take counsel and prepare a defense. There is no distinction in reason or in equity between the *Maney* case and our case; and the *Maney* decision by this Court is cogent authority for reversal of the court below.

A state court purported to cancel petitioner's naturalization. But that court, no less than the federal courts, was bound in a naturalization matter to act pursuant to the provisions of the federal statute on naturalization. State courts, acting in naturalization matters, whether pertaining to the grant or cancellation of naturalization, are as strongly bound as the federal courts to observe all statutory provisions, substantive and procedural. For when acting in a naturalization matter, the state court acts purely as a federal agent, and pursuant to the controlling federal statute, now the Nationality Act. *Holmgren* v. *U. S.*, 217 U. S. 509; *Grahl* v. *U. S.*, 261 Fed. 487 (C.C.A. 7th, 1919); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. (2d) 390 (C.C.A. 7th, 1947); see 40 Cong. Rec. 7052. State rules, by statute or case law or judicial practice, on such questions as venue, notice, service, vacation of judgments in the same term, etc., are irrelevant to matters of naturalization. The power to act in such matters can derive only from the federal statute on naturalization. Such is the settled doctrine of the whole body of law on naturalization, the various evidences of which we have set forth in detail in the foregoing discussion.

The Court, in the *Volpe* case, puts the matter most succinctly (161 F. (2d) 390, 395):

> "Thus there can be no doubt but that the entire field of naturalization legislation is within the exclusive domain of Congress and the procedure both for naturalization and denaturalization has been specifically and definitely established. One who seeks the former, just as one who seeks the latter, has the burden of showing strict compliance with the procedure thus established. This must be true in all courts upon whom Congress has conferred jurisdiction, Federal and State alike. As we have shown, a State Court when acting in naturalization matters does so as a Federal court or as an agent of the Federal government. It seems plain that when acting in such capacity it cannot depend upon an iota of authority which may stem from its own rules or the State law, whether embodied in statutory provisions or in the decisions of its courts.
>
> "The fact that the Superior Court had a rule which provided for the vacation of judgments under certain circumstances can have no application to a denaturalization proceeding because the court when acting in such capacity is bound by the procedure adopted by Congress. Neither do we need to inquire as to the authority of a State Court over judgments during the same term at which they were entered. Whatever may be the law as to such judgments generally, it can have no application to a naturalization judgment for the reason that Congress has specifically provided the manner in which such judgments may be revoked or vacated."[8]

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[8] The cancellation of citizenship held void in the *Volpe* case was, like the asserted cancellation of petitioner's citizenship, obtained upon a motion to vacate a judgment of citizenship made in a state court. Observe, however, that in the *Volpe* case, the state court procedure utilized to vacate Volpe's citizenship had been held good by the state courts as being in accordance with state law. *Petition of Volpe*, 328 Ill. App. 311, 66 N.E. (2d) 146. In our case, a motion to vacate filed, served, and heard on notice of less than a day could not have complied with state law. But the point is that there was no compliance with the federal statute, Section 338 of the Nationality Act of 1940. The non-compliance with state law, too, is irrelevant.

Since the Government has not seen fit to petition for certiorari from any of the many decisions against them on the question of the exclusiveness of Section 338, there is no decision of this Court on that precise question. The *Maney* decision in this Court (discussed in detail, *supra* at p. 20) requiring exact compliance with a notice provision on the granting side of naturalization is applicable in reason to a notice provision in Section 338 on the cancelling side of naturalization.

We recall as to cancellation of citizenship that "in its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty". *Schneiderman* v. *U. S.*, 320 U. S. 118, 122. A cancellation suit "is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status". *Schneiderman* v. *U. S.*, just *supra* at p. 160; *Baumgartner* v. *U. S.*, 322 U. S. 665, 675; *U. S.* v. *Jackson*, 55 F. Supp. 517, 520 (E.D. Mich., 1944). For these reasons, this Court firmly interprets Section 338 as requiring the Government to produce "clear, unequivocal, and convincing evidence which does not leave the issue in doubt" before citizenship can be cancelled. *Knauer* v. *U. S.*, 328 U. S. 654, 657; *Schneiderman* v. *U. S.*, 320 U.S. 118, 123, 125; *Baumgartner* v. *U. S.* 322 U. S. 665, 670, 671, 678.

The doctrine of the *Knauer-Schneiderman-Baumgartner* line of decisions rather plainly demands the striking down of the purported cancellation of petitioner's citizenship. The procedure that rushed petitioner to loss of citizenship on hearsay and questionable evidence (R. 11-19) in less than a day, and without the opportunity afforded to petitioner to take counsel and prepare a defense, does not square with the extreme protection of the citizen required by the *Knauer, Schneiderman* and *Baumgartner* cases.

Cf. U. S. v. *Kiriaze*, 172 F. (2d) 1000, 1002 (C.C.A. 5th, 1949).[9]

Neither does the decision below square with the Federal Rules of Civil Procedure. The purported cancellation of petitioner's citizenship was in a state court. But the court below was rightly preoccupied with, and troubled by Rule 81(a)(2) and (6) of the Federal Rules of Civil Procedure (R. 30). The rights of a citizen under a uniform system of naturalization committed to federal power cannot vary according to the forum in which cancellation of naturalization is sought. Yet, reasonably read, Rule 81(a)(2) and (6) requires compliance with the Nationality Act of 1940 in all naturalization matters, both grant and cancellation.

In our system of law based on the rational powers of men, a case which is rightly decided tends, at the very least, to fit in with the law or underlying legal principles surrounding its particular problem. It is significant, as we have seen from the foregoing review of the authorities, that the decision under review here clashes with everything around it.

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[9] We note the scanty support afforded respondents by three dicta. *Petition of Weltzien*, 68 F. Supp. 1000 (S. D. N. Y., 1944) states, but does not decide, that cancellation may be obtained upon a motion to reopen the naturalization judgment and without reference to Section 338. The statement is described, by the judge who made it, as "a perfunctory examination of the matter" (p. 1002); and that perfunctory examination of the matter does not square with controlling authority in its own jurisdiction. See *U. S. ex rel. Stabler* v. *Watkins*, 168 F. (2d) 883 (C.C.A. 2nd, 1948). A statement similar to the *Weltzien* dictum, but somewhat more ambiguous, is contained in *U. S.* v. *Aakervik*, 180 Fed. 137 (D. C. Ore., 1910). Respondents would be the first to urge bad reasoning in the *Aakervik* case which holds Section 15 of the 1906 Act unconstitutional so far as it provides for cancellation of illegally-procured citizenship after the term of court in which such citizenship was procured. *In re Macoluso's Naturalization*, 237 Pa. 132, 85 Atl. 149 (1912), states that Section 15 of the Act of 1906 is not exclusive. The *Macoluso* case, described by the court below as "a leading authority of 28 years standing for the very proposition now in issue" (R. 31), was not concerned with cancellation of citizenship. It dealt only with the delivering up of a forged certificate of citizenship that had never issued out of any court at all. See the *Macoluso* case, 237 Pa. 132, 134; 85 Atl. 149, 150.

None of these dicta for the Government approved of any such lack of safeguarding procedure as resulted in asserted loss of petitioner's citizenship.

B. The Revocation of Petitioner's Citizenship Was Invalid for Want of Due Process.

That the due process clause, whether it be Fifth or Fourteenth Amendment, applies to revocation of citizenship needs no belaboring.[10] Nor need we belabor that due process required reasonable notice to petitioner and a fair opportunity to be heard.[11] Accepting the most restrictive approach to that requirement, namely "an appraisal of the totality of facts,"[12] the question here is—was petitioner on all the facts accorded reasonable notice and opportunity to be heard.

Petitioner is not a lawyer. He works with tools (R. 4). In December, 1943, when his citizenship was revoked, he was a private in our army who had been in the United States for just five years (R. 19; 15; 3). He was away from home, family and friends (R. 3; 5; R. 11-20). Military service restricts freedom of movement. But your petitioner at the time of his revocation "hearing" was under the additional restraint of military arrest (R. 12). As Major Dooley, who testified against him, stated: Petitioner in the week before his "hearing" was "out to one of our sort of little bivouac camps and I haven't been out there" (R. 15). Such was the load upon petitioner on December 9, 1943.

On that day, petitioner was served with notice of hearing to revoke his citizenship (R. 17). On that day, the revocation hearing was held (R. 17). And on that day his citizenship was revoked (R. 19).

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[10] *Schneiderman* v. *U. S.*, 320 U. S. 118; *Baumgartner* v. *U. S.* 322 U. S. 665; *Knauer* v. *U. S.*, 328 U. S. 654; *Johannessen* v. *U. S.*, 225 U. S. 227; *Chin Yow* v. *U. S.*, 208 U. S. 8; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yung Sung* v. *McGrath*, 339 U. S. 33; and the cases cited in footnotes 11 and 14, *infra*.

[11] *Garfield* v. *Goldsby*, 211 U. S. 249; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; and the cases cited in footnote 14, *infra*.

[12] See *Betts* v. *Brady*, 316 U. S. 455, 462; *Ashcraft* v. *State of Tennessee*, 322 U. S. 143, 158 (dissenting opinion complaining of abolition of "the totality of facts" rule in a field cognate to the present question).

In the opinion of Congress sixty days notice to a citizen of revocation proceedings is appropriate. So Congress provides in Section 338. Something less might still be reasonable. But as petitioner was situated, the notice of less than a day which he got was not reasonable. It left him no time for his protection. That he was mentally confused is apparent. See R. 15-16, and 19. But there was no time to speak in confidence to someone he could trust —someone he could feel was indubitably on his side, to quiet his excitement and help him to clarify his thoughts and feelings; someone, working for him, to trace down the cause of his confusion and help him rationally to separate it from his oath of allegiance. Observe in this connection that immediately after taking his oath of allegiance petitioner apparently had no reservation as to the truth and sincerity of that oath and his willingness to bear arms for his country (R. 12).[13]

There was not even the opportunity to speak with someone, on his side or otherwise, who might tell him of a right to secure counsel and the advisability of doing so. Prior to the notice of revocation proceedings, petitioner, while under arrest and guard, had the benefit of an interrogation for one hour and a half by the Post Intelligence Officer, Major Dooley, who sought "to gain his confidence" (R. 12; 16). Dooley, who testified against petitioner at the revocation "hearing," did not advise him to seek counsel (R. 12; 16).

There was no opportuity to retain counsel, or even to learn of a right to retain one. With no counsel retained, there was no one to advise delay and preparation, to obtain time, and to utilize the time obtained in preparation for hearing, or indeed in elimination of any need for revocation proceedings. There was no counsel to advise

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13 What intervened between oath and revocation to upset petitioner does not appear of record. The writer believes that what did intervene will provide a successful defense in any fair hearing on revocation. There would otherwise be little point to this protracted litigation. But here we observe the limitations of the record, and, in the text, merely point out what can be inferred from the face of it.

petitioner of the full consequences—loss of wife, child, home and country—if he did himself less than justice in ascertaining the true state of his feelings.

With no opportunity to retain counsel, to take courage, or to prepare himself in any way, petitioner was defenceless at the "hearing." Without objection, a witness was permitted to testify that he saw "grins or smirk" on petitioner's face at the time of his naturalization (R. 14). Petitioner stated in so many words the conclusion that he had sworn falsely in his oath of allegiance (R. 19). With respect to that conclusion on a point where the exact nature and the exact time of petitioner's confused feelings were all-important, there was no one to point out to the court that petitioner's reasons for so concluding did not jibe with the conclusion (See R. 19; and 16). There was no one to emphasize the difference between expression of a desire not to fight and refusal of an order to do so, or to question the relevance of either to revocation. Finally, with the record in that dubious state, there was no one to urge the applicability of the *Schneiderman-Baumgartner-Knauer* rule (See discussion at p. 23, *supra*) on the clear and unequivocal showing that must be made before a citizen can be denaturalized and put beyond the pale.

That is the "totality of facts."

In critical times, due process wears thin. But no critical period, past or present, has ever produced an American judicial utterance which calls what happened here due process.

Plainly enough, petitioner did not receive reasonable notice and the opportunity to be heard. He got an extremely raw deal. The pertinent authorities[14] and every consideration of "essential fairness" (*Adams* v. *U. S. ex rel McCann*, 317 U.S. 269, 279) inherent in the "fundamental principles of liberty and justice" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 601) require the striking down of

[14] *U. S. ex rel. Turner* v. *Fisher*, 222 U. S. 204; *In re Oliver*, 333 U. S. 257; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Hawk* v. *Olson*, 326 U. S. 271.

the revocation of petitioner's citizenship for want of due process.

CONCLUSION.

In our view, there is no substantial doubt as to either the fact of the intent of Congress to make Section 338 exclusive or the fact of the abundant judicial precedents which so interpret the intent of Congress.

If there were such a doubt, the doubt would be resolved in petitioner's favor. Naturalization matters are required by the Constitution to be uniform. The constitutionality of a non-exclusive Section 338 is highly questionable. If the Circuit Court of Frederick County could vary the statutory cancellation procedure in one manner, another court could vary it in another.

Nor need the damage stop there. The obtaining of citizenship and the cancelling of citizenship are the two sides of the one coin. If cancelling procedure can be ignored; so, too, can granting procedure. And thus the uniformity required by the Constitution evaporates.

Indeed, in this aspect of the matter, it is ironic that the very officials of Government who are charged with the enforcement of uniformity in naturalization matters argue here for its stultification.

Finally, if there were any doubt as to the problem here, that doubt should be resolved in petitioner's favor for a strong reason of equity. If the Government loses here, it is not without remedy. Fraud, if there be fraud, can be asserted against petitioner in a Section 338 proceeding at any time the Government sees fit to institute suit. But if petitioner loses here, he has irrevocably lost citizenship, family and home—and in just a few hours.

We respectfully submit that the judgment of the Court below was rather plainly wrong, and should be reversed.

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September, 1951.

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No. 632

In the Supreme Court of the United States

OCTOBER TERM, 1950

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 612

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 23-32) is reported at 184 F. 2d 225.

JURISDICTION

The judgment of the Court of Appeals (Clark, Miller, and Proctor, JJ.) was entered on June 19, 1950 (R. 33), and a petition for rehearing before the full court (R. 34-44) was first denied by

the same panel on September 28, 1950 (R. 45). The order denying the petition was vacated by the court *sua sponte* on November 21, 1950 (R. 47), and on December 21, 1950, the petition for rehearing was denied by the court *en banc* (R. 48). The petition for a writ of certiorari was filed on March 15, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in enacting Section 338 of the Nationality Act of 1940 governing proceedings for denaturalization, Congress intended to make such a proceeding exclusive, so as to abridge the inherent and historical power of a court of record to vacate and set aside for good cause and after a hearing, its own naturalization decree issued within the same term of court.[1]

STATUTE INVOLVED

Section 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U.S.C. 738, provides in pertinent part as follows:

(a) It shall be the duty of the United States district attorneys for the respective

[1] Petitioner asserts that if this question is answered in the negative, the case also presents a question whether the order of the state court vacating its order admitting petitioner to citizenship "was void under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments" (Pet. 2). He does not argue this question, however, and furthermore his complaint in the District Court was based solely upon his contention that Section 338 of the Nationality Act provides the exclusive method for revoking a naturalization decree (R. 5-6).

districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.[2]

STATEMENT

On December 2, 1943, petitioner, a German immigrant, while a soldier in the United States Armed Forces stationed at Camp Ritchie, Maryland, filed a petition for naturalization, and, after

[2] These provisions are a re-enactment in substantially the same terms of Section 15 of the Act of June 29, 1906, 34 Stat. 596, 601.

testifying under oath at the naturalization proceedings that, among other things, he believed in the form of Government of the United States and was willing to bear arms against all its enemies, was admitted, on the same date, to United States citizenship by order of the Circuit Court of Frederick County, Maryland, and was issued a certificate of naturalization by that court (R. 17-19, 23).

On December 3, 1943, after learning that he had received a promotion and had been alerted for overseas duty (R. 12-16), petitioner made statements to the Post Intelligence Officer disclaiming his loyalty to the United States, and also stated that he was unwilling to bear arms for this country and did not desire to remain here after the war was over (R. 14-15). On December 9, 1943, seven days after petitioner's naturalization, and within the same term of the Circuit Court, the United States Naturalization Examiner, on behalf of the United States, filed in the naturalization proceeding a motion to vacate the order of December 2 admitting petitioner to citizenship (R. 13; see also R. 23-24). The same day, notice of this motion was served on petitioner, who was then under military arrest (R. 17, 24). A special hearing on the motion was had on the same day (R. 13-19), at which petitioner admitted that when he testified under oath during the naturalization proceeding that he approved of this Government and would

fight for this country, he "swore falsely" (R. 18-19). Petitioner testified, in part, as follows (R. 18-19):

Q. This affidavit clearly sets forth your opinion, is that correct?

A. Yes.

Q. You do not wish to change that statement in any way?

A. Could I read it once more, please? (Referring to paper marked Exhibit B.) When I said here that—"and wish to go back to Germany after the war," I supposed that Germany will have a different government, and not the same Nazi government.

Q. That is presumed to be true, but the affidavit sets forth your feelings that you do wish to return to Germany, is that correct?

A. Not necessarily. I have my choice. I mean if I don't want to fight for this country I can't expect to remain in this country, and the country I came from is Germany. That is why I mentioned Germany here.

Q. You definitely do not wish to fight for the United States, is that correct?

A. No, that is correct.

Q. When you were here on December 2, 1943 and filed your petition, did you feel the same way at that time?

A. Yes.

Q. How long before had you felt that way?

A. I have felt that way for several weeks, but I mean it just didn't pop up that way.

Q. You felt that way when you came in here and filed the petition on the morning of December 2, 1943, is that correct?

A. Yes.

Q. (The Court) Did I understand you to say you did swear that you approved of this Government and that you would fight for this country?

A. While I was in Court here, yes, sir.

Q. You were swearing falsely at that time?

A. Yes, sir.

Q. (Mr. Cook [Naturalization Examiner]) Is there anything further you wish to say in this matter?

A. Well, the reason why I swore falsely is because that some people have had me before and while I was an alien, and I figured that these people were nice people and I didn't want to bring them any trouble. While I was an enemy alien, I figured being I was made a citizen would sort of break up the connections between these people and me, because in a way they were sponsors for me, because one of the witnesses who was my sponsor and many other people signed statements about me, about my character and so on.

Q. (The Court) Is that all?

A. Yes, sir.

At the conclusion of the hearing on December 9, 1943, the Circuit Court entered an order reciting that its order of December 2 admitting petitioner to citizenship "is hereby vacated and set aside,

and restored to the pending calendar for immediate hearing," and that "the original and duplicate certificate of naturalization * * * be voided and returned to the Immigration and Naturalization Service" (R. 19-20).

On June 15, 1948, while in custody of the Department of Justice after having been ordered deported, petitioner filed in the District Court for the District of Columbia a complaint praying for a judgment declaring him to be a citizen of the United States on the ground that the order of the Maryland Circuit Court vacating its prior order admitting him to citizenship was void because it was not issued in conformity with the requirements of Section 338 of the Nationality Act of 1940 (R. 2-9).

Respondents moved to dismiss the complaint on the ground that it failed to state a cause of action (R. 11), and petitioner moved for summary judgment (R. 20). Petitioner's motion was granted and judgment was entered declaring him "to be a national and citizen of the United States" (R. 20-21).[3]

On appeal by respondents, the Court of Appeals reversed the judgment and remanded the cause with instructions to dismiss the complaint (R. 33).

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[3] The order further stated that it was "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940 (8 U.S.C. 738)."

DISCUSSION

Petitioner did not in his complaint in the District Court and he does not now (cf. Pet. 6) claim that he did not perpetrate a fraud upon the Maryland Circuit Court when he obtained admission to citizenship on December 2, 1943. His sole contention is that the Circuit Court's order of December 9, 1943, vacating its order of December 2, was null and void because Section 338 of the Nationality Act of 1940 provides the exclusive method whereby a decree admitting an alien to citizenship may be revoked, and, admittedly, the requirements of that section were not satisfied in the proceedings which led to the entry of the order of December 9. The Government's position is that the Maryland court had jurisdiction to vacate its judgment entered a week previously upon the showing made that petitioner procured that judgment by a false oath of allegiance.[4]

1. It has been settled since *Tutun* v. *United States*, 270 U.S. 568, that a naturalization proceeding is judicial in nature and that the resulting

[4] The oath required of applicants for naturalization is prescribed by Section 335 of the Nationality Act, 8 U.S.C. 735 (b): "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature."

order is a judgment of the same standing as any other judicial judgment. See also *Schneiderman* v. *United States*, 320 U.S. 118, 123.

It is a well established rule of the common law that courts of record or of general jurisdiction have, under proper circumstances, full control over their orders or judgments during the term at which they are made, and have inherent judicial power, on sufficient cause shown and within their sound discretion, to amend, correct, open, vacate or set aside their own judgments. *Bronson* v. *Schulten*, 104 U.S. 410; *North* v. *Town Real Estate Corp.*, 60 A. 2d 665 (Md. 1948); *Eddy* v. *Summers, et al.*, 183 Md. 683 (1944); *Harvey* v. *Slacum*, 181 Md. 206 (1942). Since the founding of our nation the courts, both state and federal, have used this equitable power, recognized ages before in English jurisprudence, to protect themselves against fraud. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238; *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 499; *Shelton* v. *Van Kleeck*, 106 U.S. 532; *Whiting* v. *Bank of United States*, 13 Pet. 6, 13-15.

It was a common practice prior to 1906 for naturalization courts, both state and federal, in the exercise of their inherent equitable powers, to vacate, set aside, or cancel naturalization judgments on grounds of fraud. *United States* v. *Mansour*, 170 Fed. 671, 675 (S.D. N.Y.); *United States* v. *Kornmehl*, 89 Fed. 10 (D. N.J.); *United States* v. *Norsch*, 42 Fed. 417 (C.C. E.D. Mo.); *State ex rel. Lacy* v. *Brandhorst*, 156 Mo.

457 (1900); *Tinn* v. *United States District Attorney*, 148 Cal. 773 (1906); see also Ann. Cas. 1914 B, 229-230.

Section 15 of the Nationality Act of 1906, the forerunner of the present Section 338 of the Nationality Act of 1940, was the first express statutory provision for the revocation of an order admitting a person to citizenship. The remedy provided by this statute is not confined to the court in which the alien was naturalized; it enjoins upon the United States Attorney the duty to institute such a proceeding in any court having naturalization jurisdiction in "the judicial district in which the naturalized citizen may reside at the time of bringing the suit." Naturalization courts, both state and federal, have not regarded the enactment of this remedy as depriving them of their equitable powers whenever it was deemed necessary to invoke them to vindicate the integrity of their judgments. Thus, in *Macoluso's Naturalization*, 237 Pa. St. 132, 137-138 (1912), the court rejected the contention that Section 15 of the 1906 act established an exclusive procedure for revoking a naturalization judgment:

> Whatever may be the proper interpretation of the Act of 1906, we think it clear that it does not prevent a State court from controlling its own records in any case in which it has jurisdiction to act. If a State court has authority to naturalize aliens and issue certificates of citizenship, it is not within the power of Con-

> gress to deprive it of its equitable powers to correct any fraud upon, or fraudulent use of, its process. Congress may establish a uniform rule of naturalization, as authorized by the Federal Constitution, but it certainly will not be presumed, in the absence of a declaration to the contrary, that such legislation prevents any court, State or Federal, from annulling a certificate of citizenship bearing its seal which is a forgery. The power to correct and purge its records is inherent in every State court of general jurisdiction, and it may be exercised in the case of the naturalization of an alien as well as in any other case in which it has jurisdiction to act. It, therefore follows that the Act of 1906, relied on by the appellant, did not deprive the court below from entering its decree annulling the forged certificate of citizenship and directing that it be surrendered for cancellation.

More recently, in *Petition of Weltzien*, 68 F. Supp. 1000 (S.D.N.Y.), the court overruled a contention as to the exclusiveness of the statutory cancellation proceeding and upheld its power to vacate a naturalization judgment entered at the same term so as to permit the introduction of newly discovered evidence.

Other courts, in cases not directly involving this question, have interpreted the statutory remedy as not abrogating the traditional power of courts over their judgments, but as providing a new and additional protective measure against fraudulent

and illegal naturalization where other remedies have been foreclosed by the lapse of time and consequent loss of authority to act in the original naturalization proceeding. See *Sourino* v. *United States*, 86 F. 2d 309, 311 (C.A. 5); *United States* v. *Ovens*, 13 F. 2d 376, 377 (C.A. 4) ("The statutory provision [§ 15 of the 1906 act] authorizing the filing of such a bill creates a new remedy, which in some respects is broader than that existing independently of statute");[5] *United States* v. *Aakervik*, 180 Fed. 137, 142-143, 147 (D. Ore.); cf. *United States* v. *Ness*, 245 U.S. 319, 325 ("The remedy afforded by § 15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments").

The legislative history of the 1906 act, although shedding no light on the question whether the statutory cancellation proceeding was intended to be the exclusive remedy for revoking a naturalization judgment, shows that Congress was cognizant of widespread frauds in naturalization matters and of the then existing practice of naturalization courts to cancel naturalization certificates in the exercise of their inherent power over their judgments. Its primary purpose was to stiffen the requirements for naturalization and tighten the

[5] The court held that the denial by the state naturalization court of the Government's motion in the original naturalization proceeding to cancel the applicant's certificate of naturalization on the ground that it had been illegally procured did not bar a suit for cancellation under § 15 in a federal court.

procedure for granting it as a means of combating fraud. See H. Rep. No. 1789, 59th Cong., 1st sess., pp. 2-3; H. Doc. No. 326, 59th Cong., 2d sess., pp. 131-135. In such a context, it seems to be a fair inference that in adding Section 15 Congress intended to provide a further safeguard against fraudulent or illegal naturalization, without impairing the historic authority of courts over their own judgments.[6]

There is no warrant in the statutory language for an inference that Congress intended to abridge this authority. Section 338 of the 1940 Act, like its predecessor, Section 15 of the 1906 Act, imposes a duty on United States Attorneys to invoke the remedy it provides, without any limit of time. And it provides that a proceeding thereunder shall be brought in the judicial district where the naturalized person resides, which may or may not be the district in which he was naturalized. To hold that this remedy is exclusive would be to divest the courts upon whom frauds may be perpetrated of their inherent power, within the limits of their authority to act in the original proceeding, to rectify such fraud by vacating the judgment which it evoked and would compel them to depend upon the

[6] Cf. the opinion below (R. 30): "* * * the *Macoluso* case was a leading authority of 28 years standing for the very proposition now in issue when Congress in 1940 substantially reenacted section 15 of the 1906 Act. Certainly, had Congress felt that it presented an evil to be rectified, it would have indicated in some way its intention to correct the impression of that case."

United States Attorney of the district where the perpetrator resides to determine whether action should be taken under Section 338. In the absence of express provision to that effect, the presumption is that this section did not abolish the common law remedy, and that the new remedy should be regarded as cumulative rather than exclusive of previous remedies. *Meister* v. *Moore*, 96 U.S. 76; *Hoage* v. *Murch Bros. Const. Co.*, 50 F. 2d 983 (C.A. D.C.); *Macoluso's Naturalization, supra*, at 138.

2. Petitioner relies principally upon a claim of conflict between the decision below and *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C.A. 7), and certain decisions in other circuits[7] (Pet. 7-8); he also claims that the decision here is "probably in conflict with applicable decisions of this Court"[8] (Pet. 10-12). We think it is unnecessary to discuss the cases other than *Volpe*, for they did not involve the question presented here and petitioner's own discussion of them shows that they are inapposite.[9]

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[7] *United States* v. *Watkins*, 168 F. 2d 883 (C.A. 2); *United States* v. *Stabler*, 169 F. 2d 995 (C.A. 3); *United States* v. *Kiriaze*, 172 F. 2d 1000 (C.A. 5); *United States* v. *Sotis*, 131 F. 2d 783 (C.A. 7); *United States ex rel. Harrington* v. *Schlotfeldt*, 136 F. 2d 935 (C.A. 7), certiorari denied, 327 U.S. 781.

[8] *Knauer* v. *United States*, 328 U.S. 654, 657; *Baumgartner* v. *United States*, 322 U.S. 665, 675; *Schneiderman* v. *United States*, 320 U.S. 118, 123, 125; *Maney* v. *United States*, 278 U.S. 17; *United States* v. *Ginsberg*, 243 U.S. 472.

[9] As the court below said (R. 26-27): "* * * * none of the cases cited by him refer to the situation here but rather to a proceeding in which the Government has avowedly sought its

Volpe was admitted to citizenship on March 27, 1920, in the Superior Court for Cook County, Illinois, over the Government's objection. Seven days later, on April 3, 1920, upon an oral *ex parte* application of the United States, and without any notice to Volpe, the court vacated its previous order and restored Volpe's petition for naturalization to the pending calendar. About four years later that petition was dismissed, allegedly upon Volpe's written request. Subsequently, he filed a new petition for naturalization which was denied. Later he was ordered deported. The validity of the deportation order was upheld by the Court of Appeals for the Seventh Circuit,[10] and affirmed by this Court,[11] with neither Court specifically passing on the issue of Volpe's nationality. Thereafter, he filed a motion in the Superior Court for Cook County to expunge from its records the order

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authority to act from either section 15 of the 1906 Act or section 338 of the current Act. Of course the broad language gleaned from these cases supports the proposition that there must be strict compliance with the statute. There is no question that Congress so intended. But it is self evident that these cases cannot be used as authority on the present question, especially in view of the fact that in none of them does the government contend, even though it may have failed to comply with the statutory conditions for denaturalization, that the authority to proceed as it did could be found elsewhere. Furthermore, as far as we have been able to ascertain, in none of these cases was the attempted denaturalization instituted in the court issuing the naturalization order within the same term that the order was issued, as a part of the original proceeding, rather than as a separate proceeding under the statute."

[10] *United States ex rel. Volpe* v. *Smith*, 62 F. 2d 808 (C.A. 7).

[11] *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422.

vacating the order admitting him to citizenship. This motion was denied on the ground that the court was without jurisdiction to grant it.[12] Finally, he again petitioned for a writ of habeas corpus in the District Court for the Northern District of Illinois. In this petition he assailed the validity of the Superior Court's order revoking his naturalization upon the ground that it was entered in violation of the rules of that court, which required that in every case at least one day's written notice be given to the adverse party before a motion could be heard or an order made, and he had not received any notice of the motion nor was there any notation of such notice to him upon the records of the court.

In reply to the petition, the Government, without denying that Volpe had no notice prior to issuance of the order of revocation, interposed a plea in bar alleging that the question of his alienage had been determined adversely to him in the deportation litigation. The plea was sustained.

On appeal to the Court of Appeals, it was held by a divided court that the trial court improperly sustained the plea in bar because the question of Volpe's alienage was not resolved in the previous litigation, since at that time the courts had "assumed for the purpose of deciding the validity of

[12] On appeal, the denial was affirmed by the Appellate Court of Illinois, *Volpe* v. *United States*, 328 Ill. App. 311, and the Supreme Court of Illinois refused to review the case. 393 Ill. 630.

the deportation proceedings that petitioner was an alien and not a citizen" (161 F. 2d at 392). The court also held that since the prior case was a habeas corpus proceeding the doctrine of *res judicata* was not applicable. Thus, as the court said, the plea in bar, the only matter before the court, was "disposed of in short order" (*ibid.*). But, after pointing out that the case had been "presented and argued on the theory that petitioner's certificate of naturalization was unlawfully vacated and set aside because no notice was given to him in compliance with a rule of the Superior Court of Cook County," the court said that there was "a better, in fact we think a controlling, reason why the allegation that no notice was given presents a triable issue" (pp. 392-393). After adverting to the exclusive power of Congress in the field of naturalization and Section 338 of the Nationality Act, the court said (p. 395):

> * * * As we have shown, a State court when acting in naturalization matters does so as a Federal court or as an agent of the Federal government. It seems plain that when acting in such capacity it cannot depend upon an iota of authority which may stem from its own rules or the State law, whether embodied in statutory provisions or in the decisions of its courts.
>
> The fact that the Superior Court had a rule which provided for the vacation of judgments under certain circumstances can have no ap-

> plication to a denaturalization proceeding because the court when acting in such capacity is bound by the procedure adopted by Congress. Neither do we need to inquire as to the authority of a State court over judgments during the same term at which they were entered. Whatever may be the law as to such judgments generally, it can have no application to a naturalization judgment for the reason that Congress has specifically provided the manner in which such judgment may be revoked or vacated.

The court concluded, therefore, that the Superior Court's order vacating its order admitting Volpe to citizenship "was void if entered; as alleged, without notice to petitioner * * * because under such circumstances it was entered in utter disregard of the manner and procedure prescribed by Congress" (pp. 395-396). The court added that if "we assume, contrary to our holding, that the Federal procedure is inapplicable, we still think the order of April 3, 1920 is void if, as alleged, it was entered without notice as required by the court rule" (p. 396). The judgment remanded the cause "with directions that respondent be permitted to answer the petition and to show if it can that the order of March 27, 1920 admitting petitioner to citizenship has been revoked or cancelled, in conformity with the law as decided herein" (*ibid.*).

The court below said that whether or not this opinion as to the exclusiveness of the statutory remedy expressed in the *Volpe* case was *dictum*, it could not accept that opinion because the court felt it lacked "force as authority for the reason that we believe it is based on a misunderstanding of the effect of a naturalization order as a judgment" (R. 27-28). The court below also noted that the *Volpe* opinion did not "even mention the earlier case of *In re Macoluso's Naturalization*" (*supra*), and added, "As authority therefore, the *Volpe* case stands much weakened in our eyes" (R. 30).

Although we feel strongly that the decision below is correct, in view of the divergent views of the Seventh Circuit and the court below on the sole issue presented here, we hesitate to oppose the petition. The Seventh Circuit's views, however, were *obiter* in nature. And it should be noted that the question is a rather novel one, as evidenced by the fact that in the 45 years since the statutory cancellation proceeding has been in effect there have been only four reported decisions which deal directly with the exclusiveness *vel non* of that remedy (i.e., *Macoluso, Weltzien, Volpe, supra*, and the instant case). The paucity of decisions on the question of the power of a naturalization court over its own judgment during the term, indicates, we believe, that the issue rarely arises and is not of general importance. This may

perhaps be due to the elaborate administrative pre-examination procedures now in use and the consequent weeding out of unqualified applicants for citizenship, with the result that fraud or illegality is not discovered until after the naturalization court has lost jurisdiction in the original proceeding and the only remedy available is the statutory denaturalization proceeding.

In these circumstances, the Court may conclude that there is no imperative necessity for review here to consider the divergent views of the Seventh Circuit and the court below.

Respectfully submitted.

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No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1951

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Federal Rules of Criminal Procedure, Rule 45 (c) — 26
1 Freeman, *Judgments* (1925 ed.), §§ 194 and 195 — 24
Moore, *Federal Practice* (2d ed.), par. 6.02, 6.09 — 27
Moore, *Federal Practice*, Ch. 60 — 27
Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L. J. 623 (1946) — 22, 27
Reviser's Note to Judicial Code, Section 452 — 26
9 Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789–1897* (Wash. 1898), 116 — 34
Stern & Gressman, *Supreme Court Practice* (1950), pp. 322–326 — 25

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 18

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 23–32) is reported at 184 F. 2d 225.

JURISDICTION

The judgment of the Court of Appeals (Clark, Miller, and Proctor, JJ.) was entered on June 19, 1950 (R. 33). A petition for rehearing before the full court (R. 34–44) was first denied by the same panel on September 28, 1950 (R. 45). The order denying the petition was vacated by the court *sua sponte* on November 21, 1950 (R. 47),

and on December 21, 1950, the petition for rehearing was denied by the court *en banc* (R. 48). The petition for a writ of certiorari was filed on March 15, 1951, and was granted on April 30, 1951. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 338 of the Nationality Act of 1940, authorizing proceedings for denaturalization, abridges the inherent and historical power of a state court of record to vacate and set aside, for good cause, its own naturalization decree issued within the same term of court.

2. Whether the order of the state court vacating its prior naturalization decree should have been disregarded on the ground that it was entered in violation of due process.

STATUTE INVOLVED

Section 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides in pertinent part as follows:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and can-

celing the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.[1]

STATEMENT

On December 2, 1943, petitioner, then a German alien, while a soldier in the United States Armed Forces stationed at Camp Ritchie, Maryland, filed a petition for naturalization. A hearing was had on the same day in the Circuit Court of Frederick County, Maryland, at which a group of 80 applicants (R. 14), including petitioner, appeared and were "asked the usual questions" as to their belief in the American form of government and

[1] These provisions are a re-enactment in substantially the same terms of Section 15 of the Act of June 29, 1906, 34 Stat. 601.

willingness to bear arms. (R. 17). Petitioner testified under oath that, among other things, he believed in the form of government of the United States and was willing to bear arms against all its enemies. (R. 17–19). Necessarily, he also took the oath required by § 335 (b) of the Nationality Act as a condition to naturalization:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God.

Thereupon he was, on the same day, admitted to United States citizenship by the Circuit Court of Frederick County, Maryland, and was issued a certificate of naturalization by that court (R. 17–19, 23).[2]

On December 3, 1943, after learning that he had received a promotion and had been alerted

[2] Apparently these proceedings were had pursuant to § 324 of the Nationality Act of 1940, which permits aliens who have served three years in the armed forces to be naturalized "immediately" upon the filing of the petition, without waiting the 30 days prescribed by § 334 and without filing a certificate of arrival showing his lawful entry into the United States (see § 329) or a declaration of intention (see § 331).

for overseas duty (R. 12–16), petitioner made statements to the Post Intelligence Officer disclaiming his loyalty to the United States, and also stated that he was unwilling to bear arms for this country and did not desire to remain here after the war was over (R. 14–15, 17–18). On December 9, 1943, seven days after petitioner's naturalization, and within the same term of the Circuit Court,[3] the United States Naturalization Examiner, on behalf of the United States, filed in the naturalization proceeding a motion to vacate the order of December 2 admitting petitioner to citizenship (R. 13; see also R. 23–24). The same day, notice of this motion was served on petitioner, who was then under military arrest (R. 17, 24). A special hearing on

[3] Art. IV, Sec. 21 of the Maryland Constitution provides: "* * * The said judges shall hold not less than two terms of the Circuit Court in each of the counties composing their respective circuits, at such times as are now or may hereafter be prescribed * * *."

Sec. 72, Article 14, Code of Public Local Laws of Maryland (Chap. 9, Acts of Gen. Assembly of Maryland, 1931) provides in parts as follows:

"The Circuit Court for Frederick County shall hold four terms of court for common law proceedings, commencing respectively on the third Monday in February, on the second Monday in May, on the third Monday in September, and on the second Monday in December in each and every year * * *."

The September Term, 1943, for Frederick County Circuit Court, began on September 20, 1943, and ended on December 13th, 1943. Consequently, December 2d, and 9th, the respective dates on which the proceedings herein were had, were within the September term of the court.

the motion was had on the same day (R. 13–19), at which petitioner admitted that when he testified under oath during the naturalization proceeding that he approved of this Government and would fight for this country, he "swore falsely" (R. 18–19). Petitioner testified, in part, as follows (R. 18–19):

> By Mr. Cook [Naturalization Examiner]:
>
> * * * * * *
>
> Q. This affidavit clearly sets forth your opinion, is that correct?
>
> A. Yes.
>
> Q. You do not wish to change that statement in any way?
>
> A. Could I read it once more, please? (Referring to paper marked Exhibit B.) When I said here that—"and wish to go back to Germany after the war," I supposed that Germany will have a different government, and not the same Nazi government.
>
> Q. That is presumed to be true, but the affidavit sets forth your feelings that you do wish to return to Germany, is that correct?
>
> A. Not necessarily. I have my choice. I mean if I don't want to fight for this country I can't expect to remain in this country, and the country I came from is Germany. That is why I mentioned Germany here.
>
> Q. You definitely do not wish to fight for the United States, is that correct?

A. No, that is correct.

Q. When you were here on December 2, 1943 and filed your petition, did you feel the same way at that time?

A. Yes.

Q. How long before had you felt that way?

A. I have felt that way for several weeks, but I mean it just didn't pop up that way.

Q. You felt that way when you came in here and filed the petition on the morning of December 2, 1943, is that correct?

A. Yes.

Q. (The COURT) Did I understand you to say you did swear that you approved of this Government and that you would fight for this country?

A. While I was in Court here, yes, sir.

Q. You were swearing falsely at that time?

A. Yes, sir.

Q. (Mr. COOK) Is there anything further you wish to say in this matter?

A. Well, the reason why I swore falsely is because that some people have had me before and while I was an alien, and I figured that these people were nice people and I didn't want to bring them any trouble. While I was an enemy alien, I figured being I was made a citizen would sort of break up the connections between these people and me, because in a way they were sponsors for me, because one of the

witnesses who was my sponsor and many other people signed statements about me, about my character and so on.

Q. (The COURT) Is that all?

A. Yes, sir.

At the conclusion of the hearing on December 9, 1943, the Circuit Court entered an order reciting that its order of December 2 admitting petitioner to citizenship "is hereby vacated and set aside," and that "the original and duplicate certificate of naturalization * * * be voided and returned to the Immigration and Naturalization Service" (R. 19–20). Petitioner did not appeal from that order.

On June 15, 1948, while in custody of the Department of Justice after having been ordered deported, petitioner filed in the District Court for the District of Columbia a complaint praying for a judgment declaring him to be citizen of the United States. He asserted that the order of the Maryland Circuit Court vacating its prior order admitting him to citizenship was void because it was not issued in conformity with the requirements of Section 338 of the Nationality Act of 1940 (R. 2–9).

Respondents moved to dismiss the complaint on the ground that it failed to state a cause of action (R. 11), and petitioner moved for summary judgment (R. 20). Petitioner's motion was granted and judgment was entered declaring him

"to be a national and citizen of the United States" (R. 20–21).[1]

On appeal by respondents, the Court of Appeals reversed the judgment, holding that Section 338 of the Nationality Act of 1940 should not be construed as cutting off, with respect to naturalization judgments, "the inherent and historical power of a court over its own judgments within the same term in which they were rendered" (R. 33). It accordingly remanded the cause with instructions to dismiss the complaint (R. 33).

SUMMARY OF ARGUMENT

I

A. Since the foundation of our federal system of Government, naturalization has been a judicial function, surrounded with all the normal incidents of a judicial proceeding. *Tutun* v. *United States*, 270 U. S. 568. Whenever a question of practice has arisen on which the naturalization statute is silent, the courts have held that the proceeding is governed by the normal rules of practice obtaining in the court in which the proceeding was brought.

B. From the beginnings of the common law to the present, a normal incident of judicial power

[1] The order further stated that it was "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940 (8 U. S. C. 738)."

in English and American jurisdictions has been the general rule that all judgments, decrees or other orders of a court are under its absolute control during the term in which they are rendered. *Bronson* v. *Schulten*, 104 U. S. 410, 415. The plenary power of a court during term time to reconsider its judgments for any reason has always been considered totally different in character and scope from its very limited authority to correct or revoke a judgment after expiration of the term on certain specific grounds. See *United States* v. *Mayer*, 235 U. S. 55, 61. Relief during term time is deemed merely a continuance of the proceeding which gave rise to the original judgment. The term rule has been abolished in some jurisdictions; thus in the federal courts the continuance or expiration of the term has no effect on the court's power over its judgments, and the present equivalent of a court's unlimited power during the term would seem to be its power to entertain a motion for new trial within 10 days after entry of judgment. The courts of Maryland, however, where petitioner's application for naturalization was brought, adhere to the term rule. They deem the action of a court during term time so much a part of the original proceeding that an order setting aside a judgment during the term is not appealable as a final order, whereas an order revoking a judgment after term time is regarded as final and

appealable. *North* v. *Town Real Estate Corp.*, 60 A. 2d 665 (Md., 1948).

So firmly established is the rule that a court has absolute control of its judgments during term time, that only a very clear expression of intent has been deemed sufficient to work an alteration or abregation of the rule. Thus, rules of court specifying the time within which a petition for rehearing or for a new trial may be filed do not deprive the court of jurisdiction to vacate its judgment during the term. Hence, absent any clear expression of a contrary intention in the naturalization law, it is clear that the normal judicial power of the Maryland court to control its judgment during term time would pertain to petitioner's naturalization proceeding.

C. Neither the language nor the legislative history of the denaturalization statute reveal an intent to alter or abridge the power of the courts to control their judgments during the term. The statute on its face relates to a separate independent proceeding which could be brought, for specified causes, after the judgment of naturalization has become final and in a court other than that in which the judgment was rendered. The legislative history sheds no light on the question of the extent to which Congress intended the provisions of the denaturalization section to be exclusive. All that can be said with certainty is that Congress revealed no clear intention to alter or

abridge the established power of courts to control their judgments during term time. Since the Nationality Acts of 1906 and 1940 continued to rely on state as well as federal courts to perform the function of naturalization, the statutes show that Congress did not intend that the procedures for naturalization be uniform in every detail. Hence statements that the statute was intended to provide a uniform rule of naturalization are of no significance with respect to the specific issue involved in this case. The legislative history does reveal that Congress was aware of the fact that certificates of naturalization were being cancelled by federal courts without statutory authority before 1906. Since such cancellation was normally obtained by independent suits in equity or by motions in the nature of equitable relief after expiration of the term, it is reasonable to assume that the term rule and its possible application to cancellation of certificates of naturalization were not in the minds either of the framers of the statute or Congress.

In *Tutun* v. *United States*, 270 U. S. 568, this Court held that a judgment of naturalization was appealable despite the absence of a statutory provision for appeal on the grounds that naturalization is a judicial function and appeal is part of the normal judicial process. That decision also recognized that appeals in proceedings brought in the state courts lie to state appellate courts. The decision therefore necessarily has

two corollaries: (1) that a judgment of a court of first instance ordering naturalization is not final when rendered but may be negated by a judicial process other than that set forth in Section 338 of the Nationality Act; and (2) that the procedure by which such negation may be achieved may vary with the forum selected for naturalization. The control by a court of its judgments during term time is as recognized a normal part of the judicial process as the right of appeal. Since there is no evidence of any Congressional intention to alter or abridge the term rule, the reasoning of the *Tutun* decision requires a holding that the courts' established power to control their judgments during term time was unaffected by the denaturalization provisions of the Nationality Acts of 1906 or 1940.

II

If, as we contend, the Maryland court had jurisdiction to reconsider its order, any question as to the propriety of the proceedings before it should have been presented in that court or on appeal from its decision. Since the Maryland court had jurisdiction of the parties and the subject matter, its decision is not open to collateral attack. *Spratt* v. *Spratt*, 4 Pet. 393. In any event, the proceedings were in full conformity with the Nationality Act. Once the original judgment had been vacated in order that the court might consider additional evidence, it was

proper for the court to proceed as on original application for naturalization. In such a proceeding, the Nationality Act merely requires a hearing in open court, which petitioner here obtained. Since the proceeding was a civil one, petitioner had no right to be furnished counsel. And petitioner had the burden of satisfying the court that he was eligible for naturalization, a burden which he plainly failed to meet. Petitioner made no request for postponement of the hearing. His testimony amounted to a deliberate abandonment of his application for naturalization and was made with explicit recognition that it would probably result in his being required to leave the United States. Such a deliberate choice would not have been set aside even in a proceeding in the same court after judgment had become final. *A fortiori*, it cannot afford the basis for a collateral attack in a different court.

ARGUMENT

I

IN ENACTING SECTION 338 (a) OF THE NATIONALITY ACT OF 1940 GOVERNING INDEPENDENT PROCEEDINGS FOR DENATURALIZATION, CONGRESS DID NOT INTEND TO ABRIDGE THE HISTORIC POWER OF A STATE COURT OF RECORD TO EXERCISE ABSOLUTE CONTROL OF ITS JUDGMENTS, INCLUDING JUDGMENTS OF NATURALIZATION, WITHIN THE TERM IN WHICH THEY WERE RENDERED

The question presented here is a very narrow one. This case is not concerned with the procedures available for setting aside, on grounds of

fraud or illegality, a judgment of naturalization which has become final. For present purposes we may assume *arguendo*, although the prevailing view appears to be to the contrary,[5] that once a judgment of naturalization has become final, it may be set aside only by the procedure established in § 338 of the Nationality Act. The issue here, however, is a very different one; it is simply whether the normal rule of a state court as to the time when its judgments become final is applicable to naturalization judgments.

Maryland, like many other jurisdictions, applies the common-law rule that a judicial judgment does not acquire complete finality until the end of the term at which it is rendered. During the term, the judgment is treated as within the bosom of the court, and as subject to modification or vacation, not merely for fraud or illegality, but

[5] A number of courts have treated § 338, or its predecessor § 15 of the 1906 Act, as merely cumulative, adding a new remedy without cutting off any existing remedy. See *In Re Macoluso's Naturalization*, 237 Pa. 132, 85 Atl. 149 (1912); *Petition of Weltzien*, 68 F. Supp. 1000 (S. D. N. Y.); *United States* v. *Orens*, 13 F. 2d 376 (C. A. 4); *United States* v. *Aakervik*, 180 Fed. 137 (D. Ore.); opinion below, R. 32. Contra, *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C. A. 7). Compare, *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 246: "Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants."

As the court below pointed out (R. 26) the other cases cited by petitioner at p. 17 of his Brief have nothing to do with this question. They merely hold that where the Government proceeds under Section 338 it must comply with that section.

for any ground bearing upon its correctness as a matter of fact or law. The Maryland court applied that rule here. On December 2, 1943, petitioner and 79 others filed petitions for naturalization and were admitted on the same day to citizenship after what was apparently a very brief examination in open court. The following day, petitioner made statements to his Army superiors inconsistent with his testimony in open court and with the naturalization oath to which he swore. A week after the first hearing, a motion was filed calling these statements to the court's attention; the motion was duly served on petitioner and he was present in court at a further hearing. On the basis of the additional evidence thus presented to it, including petitioner's testimony in open court, the court concluded that it had erred in granting naturalization in this one case, and, accordingly, set aside its previous order and voided the previously issued certificate of naturalization. All this was done within the term in which the original order was entered. The narrow question here is whether anything in the Nationality Act precluded the court from exercising as to this naturalization judgment its normal power to reconsider any judgment within the term in which it was granted and to set it aside if it appeared for any reason that it should not have been rendered.

A. *Naturalization is a judicial function with all the incidents of a normal judicial proceeding.*—

Since the time that Congress first undertook to exercise its constitutional power "to establish an uniform Rule of Naturalization" (Art. 1, Sec. 8, cl. 4), aliens have been admitted to citizenship through the courts. From the beginning, Congress has relied upon state as well as federal courts for that purpose. The first naturalization act (Act of March 26, 1790, 1 Stat. 103), authorized "any common law court of record, in any one of the states" to admit aliens having two years' residence to citizenship. Then followed a series of naturalization laws re-enacting substantially, with amendments as to qualifications for citizenship, the major provisions conferring upon the federal and state courts of record having common-law jurisdiction, authority to naturalize aliens.[6] By Sections 3 and 4 of the Act of June 29, 1906 (34 Stat. 596), the courts permitted to confer citizenship were designated as United

[6] Act of January 29, 1795 (1 Stat. 414); Act of June 18, 1798 (1 Stat. 566); Act of April 14, 1802 (2 Stat. 153), (main source of the naturalization system up to 1906) as amended by Act of March 26, 1804 (2 Stat. 292), Act of March 3, 1813 (2 Stat. 809, 811), Act of July 30, 1813 (3 Stat. 53), Act of March 22, 1816 (3 Stat. 258, 259), Act of May 26, 1824 (4 Stat. 69), Act of May 24, 1828 (4 Stat. 310), Act of June 26, 1848 (9 Stat. 240), Act of February 10, 1855 (10 Stat. 604), Act of July 17, 1862 (12 Stat. 597), Act of April 9, 1866 (14 Stat. 27) (excluding Indians not taxed from citizenship), Act of July 14, 1870 (16 Stat. 254, 256), Act of June 7, 1872 (17 Stat. 262, 268), Act of February 1, 1876 (19 Stat. 2), Act of February 8, 1887 (24 Stat. 388, 390); Act of March 3, 1893 (27 Stat. 612, 645), Act of July 24, 1894 (28 Stat. 123, 124), and Act of March 3, 1903 (32 Stat. 1213, 1222).

States courts and state courts of record "having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." Such courts still have the power to naturalize (Act of October 14, 1940, Sec. 301, 54 Stat. 1140, 8 U. S. C. 701).

Naturalization is thus a judicial function[7] and a naturalization proceeding has all the incidents of a regular judicial proceeding. *Tutun* v. *United States,* 270 U. S. 568, 576–578; *United States* v. *Macintosh,* 283 U. S. 605, 615; *Levin* v. *United States,* 128 Fed. 826, 829–831 (C. A. 8). "The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure". *Tutun* v. *United States, supra,* at 577. For that reason, a judgment of naturalization is entitled to the same freedom from collateral attack as any other judgment of a court. *Spratt* v. *Spratt,* 4 Peters 393, 408. Similarly, when a question of practice has arisen on which the naturalization statute is silent, the courts have held that the proceeding is governed by the normal rules of practice obtaining in such court. Thus in *Tutun* v. *United States,* 270 U. S. 568, 579, this Court held that, although the naturaliza-

[7] Under our constitutional system, no other conclusion is possible for, as was pointed out in 1792 in *Hayburn's Case,* 2 Dall. 409, 410, "neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." See *also Tutun* v. *United States,* 270 U. S. 568, 576.

tion statute made no provision for appeal, a judgment denying naturalization was appealable under the general statute governing appeals in all cases. Similarly, state appellate courts have held that judgments of lower state courts, both granting and denying naturalization, are appealable to state appellate tribunals, as part of the normal judicial process. *In re Clarke,* 301 Pa. 321, 152 A. 92 (1930); and see cases cited in *Tutun* v. *United States,* 270 U. S. at p. 575, fn. 3. The Federal Rules of Civil Procedure are applicable to naturalization proceedings in federal courts to the extent that the statute does not otherwise provide. Rule 81 (a) (2); *Application of Murra,* 166 F. 2d 605, 607 (C. A. 7) (Rule 52, requiring the District Court to make findings of fact and conclusions of law);[*] *Petition of Weltzien,* 68 F. Supp. 1000 (S. D. N. Y.) (Rule 59, motion for a new trial); *Application of Levis,* 46 F. Supp. 527 (D. Md.) (Rule 60 (a), correction of clerical error); *Petition of Rudder,* 159 F. 2d 695, 696 (C. A. 2) (Rule 75 (h), contents of record on appeal). State courts have likewise held that their rules of practice, including rules governing the right to correct judgments for clerical errors, are applicable to naturalization proceedings. *Matter of Wolton,* 125 Misc. 564,

[*] See also *In Re Jow Gin,* 175 F. 2d 299 (C. A. 7); but see *Wixman* v. *United States,* 167 F. 2d 808, 810 (C. A. 9), reversed, 335 U. S. 874.

211 N. Y. Supp. 501 (1925); *Santasino* v. *Karnuth*, 41 N. Y. Supp. 2d 459 (1943).

B. *A court's absolute control of its judgment during term has for so long been considered part of the judicial process of rendering the initial judgment that only a very clear expression of intent is deemed sufficient to take away or abridge such power.*—From the beginnings of the common law to the present a normal incident of Judicial power in English and American jurisdiction has been the "general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court." *Bronson* v. *Schulten*, 104 U. S. 410, 415.[9] The older text-writers phrased the rule thus:

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[9] See also *Zimmern* v. *United States*, 298 U. S. 167, 169–170; *United States* v. *Benz*, 282 U. S. 304, 307–308; *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, 40; *Goddard* v. *Ordway*, 101 U. S. 745, 752; *Basset* v. *United States*, 9 Wall. 38, 41; *Doss* v. *Tyack*, 14 How. 297, 312; *Bohlen* v. *Metropolitan Elevated Ry. Co.*, 121 N. Y. 546, 24 N. E. 932 (1890); *In re City of Buffalo*, 78 N. Y. 362 (1879); *Hatch* v. *Central National Bank*, 78 N. Y. 487 (1879); *Balch* v. *Shaw*, 7 Cush. 282 (Mass. 1851); *Department of Public Works & Buildings* v. *Legg*, 374 Ill. 306, 29 N. E. 2d 515 (1940); *State* v. *District Court*, 51 Mont. 310, 152 Pac. 753 (1915); *Moherman* v. *Nickels*, 140 Ohio St. 450, 45 N. E. 2d 405 (1942); *Clendenning* v. *Conrad*, 91 Va. 410, 21 S. E. 818 (1895); *Chessum & Sons* v. *Gordon* [1901] 1 K. B. 694.

> * * * during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie.

2 Coke on Littleton (1853 ed.) 260a; see also 3 Blackstone's *Commentaries* (Lewis, 1900 ed.) 407; 1 Bacon's *Abridgement*, Amendment and Jeofail (7th ed.) p. 223. The state courts of Maryland, like other state and federal courts, possess such inherent power. *Eddy* v. *Summers*, 183 Md. 683, 687, 39 A. 2d 812 (1944).[10]

This absolute control of its own judgments by the court during term time must be sharply distinguished from the very limited powers of a court to correct or revoke a judgment after expiration of the term. During the term, the scope of the court's inquiry is as broad as it was prior to entry of the judgment; it has "plenary power" to modify or revoke its judgment "for error of fact or law." *Zimmern* v. *United States*, 298 U. S. 167, 169–170. See also *Doss* v. *Tyack*, 14

[10] See also *North* v. *Town Real Estate Corporation*, 60 A. 2d 665 (Md. 1948); *Harvey* v. *Slacum*, 181 Md. 206, 208, 29 A. 2d 276 (1942); *State* v. *Butler*, 72 Md. 98, 100, 18 A. 1105 (1890); *Craig* v. *Wroth*, 47 Md. 281, 282 (1877); *Seth and Lowe* v. *Chamberlaine*, 41 Md. 186, 194 (1874); *Rutherford* v. *Pope*, 15 Md. 579, 581 (1860); *Robinson* v. *Commissioners*, 12 Md. 132, 141 (1858).

How. 297, 313; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25, 40. Its power is inherent and unquestioned; it is "of every-day practice." *Basset* v. *United States*, 9 Wall. 38, 41. After expiration of the term, on the other hand, a judgment can be modified or vacated, if at all, only for very limited grounds, such as certain types of fraud or mistake of fact. *Bronson* v. *Schulten, supra*; *United States* v. *Mayer*, 235 U. S. 55, 67; see Moore & Rogers, *Federal Relief from Civil Judgments*, 55 Yale Law Journal 623 (1946). The sharpness of the distinction is emphasized by the opinions in *United States* v. *Mayer, supra*, and *Bronson* v. *Schulten, supra*, the leading cases in the federal courts on relief from a judgment after term. In both, the plenary power of a court over its judgments within the term is treated as unquestioned, and the finality of judgments after expiration of the term is treated as equally unquestioned and as subject to only very limited exceptions.

The cases make it clear that any action taken during term time is regarded as merely a continuation of the original proceeding which gave rise to the judgment. The power to vacate the judgment rests in the court because the original proceeding, although culminating in a judgment, has not been terminated so as to give complete finality to the judgment until the expiration of the term of court. Thus in *Goddard* v. *Ordway*, 101 U. S. 745, this Court sustained the power of a

District Court, after an appeal had been allowed, to vacate the order allowing the appeal, set aside the judgment, and give judgment to the other side, and treated the appeal from the second order as the only one before it. Similarly in *Zimmern* v. *United States*, 298 U. S. 167, this Court ruled that an order by the district court during term, stating that it would be necessary to modify the decree, had the effect of suspending the operation of the decree, so that no appeal could be taken until it had been amended or confirmed. This Court said at p. 169, "Until such action had been taken it was no longer a decree at all." To the same effect is *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, 40, where this Court, in upholding the action of the lower court in reversing itself during term time, stated that "where a judgment or decree is set aside at the term at which it is rendered, it is as though it had never been."

The courts of Maryland, where petitioner's naturalization proceeding was brought, likewise draw a sharp distinction between the power of a court over its judgments during the term and the remedies available under Maryland law after term.[11] In Maryland, an order vacating a judg-

[11] Based upon a statutory enlargement (Maryland Act of 1787, c. 9, sec. 6) of the power of courts over their judgments, Maryland courts of record can set aside, even after term, judgments which have been procured through fraud, deceit or any other irregularity warranting relief. *North* v. *Town Real Estate Corp.*, 60 A. 2d 665 (Md. 1948); *Eddy* v. *Sum-*

ment during term time is not an appealable order since it is regarded as merely an interlocutory step in the proceeding leading to a final judgment (*Rutherford* v. *Pope*, 15 Md. 579, 581 (1860);[12] *Craig* v. *Wroth*, 47 Md. 281, 282 (1877); *Harvey* v. *Slacum*, 181 Md. 206, 208, 29 A. 2d 276 (1942)), whereas an order revoking a judgment under Maryland practice after expiration of the term is regarded as final and appealable (*North* v. *Town Real Estate Corporation*, 60 A. 2d 665 (Md. 1948)). On the same theory, that a judgment vacated during term was never really a judgment at all, the Maryland appellate court upheld the power of a lower court in a criminal case to vacate a sentence and dismiss an indictment on demurrer, despite a Maryland statute prohibiting a demurrer to an indictment after judgment (*State* v. *Butler*, 72 Md. 98, 100 (1890)). Thus, it is clear that Maryland courts, like American and English courts generally,[13] regard proceedings as still within the plenary control of the court until the

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mers, 183 Md. 683, 39 A. 2d 812 (1944); *Harvey* v. *Slacum*, 181 Md. 206, 29 A. 2d 276 (1942); *Denton National Bank of Maryland* v. *Lynch*, 155 Md. 333, 142 A. 103 (1928); *Waters* v. *Engle*, 53 Md. 179 (1880); *Smith* v. *Black*, 51 Md. 247 (1879); *Taylor* v. *Sindall*, 34 Md. 38 (1871); *Kemp* v. *Cook*, 18 Md. 130 (1861).

[12] The extent to which such an order is regarded as merely a step in the original proceeding is illustrated by the fact that the *Rutherford* case cites as authority *Ellicott* v. *Eustace*, 6 Md. 506, which held that an order permitting amendment of the pleadings was not an appealable order.

[13] See 1 Freeman, *Judgments* (1925 ed), §§ 194 and 195.

end of the term, with the result that a judgment does not achieve complete finality until the expiration of the term at which it was rendered. The court's control of its judgment during term time is essentially like a petition for rehearing, and is a normal part of the process by which the ultimate judgment is rendered.

So firmly established is the general rule that a court has absolute control over its judgments during term time that a very clear expression of intent to change has been generally deemed necessary to alter or abrogate the rule. Thus, this Court has held that its rule specifying the time within which a petition for rehearing may be filed does not deprive it of jurisdiction to grant an untimely petition within the term of court at which the assailed judgment or order was entered. *Zap* v. *United States*, 330 U. S. 800; *Stone* v. *White*, 301 U. S. 532; *Douglas* v. *Willcuts*, 295 U. S. 722; see Stern & Gressman, *Supreme Court Practice* (1950), pp. 322–326. State courts have similarly held that the mere fixing by statute or rule of a specific time for seeking a rehearing or a new trial does not restrict the court's power to control its judgments during term time.[14]

[14] *City of Hazard* v. *Duff*, 295 Ky. 701, 175 S. W. 2d 357 (1943); *First State Bank, Pineville* v. *Asher*, 273 Ky. 574, 117 S. W. 2d 581 (1938); *Detroit Edison Co.* v. *Hartrick*, 283 Mich. 502, 278 N. W. 664 (1938); *Ritchie* v. *Ritchie*, 173 S. W.

We do not argue that the term rule cannot be changed. The modern trend in many jurisdictions has been to alter the rule, not by abrogating it altogether, but by substituting for the term a fixed period during which the relief formerly available during term may be granted. *Pate* v. *State*, 244 Ala. 396, 14 So. 2d 251 (1943); *Hartford Accident & Indemnity Co.* v. *Sorrells*, 50 Ariz. 90, 69 P. 2d 240 (1937); *Goatman* v. *Fuller*, 191 Cal. 245, 216 Pac. 35 (1923); *Barnard* v. *Michael*, 392 Ill. 130, 63 N. E. 2d 858 (1945); *Hutchinson* v. *Hutchinson*, 293 Ky. 270, 168 S. W. 2d 738 (1943); *Zicarelli* v. *General Finance Co.*, 14 N. J. Misc. 711, 186 A. 726 (1936).

Thus, the significance of the term on the finality of judgments has been abolished in the federal courts. Section 452 of the Judicial Code of 1948 (28 U. S. C. 452) provides that "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding." This provision is derived from Federal ules of Civil Procedure, Rule 6 (c), but is made applicable to all proceedings whether or not civil in nature. See Reviser's Note to § 452. See also Criminal Rule 45 (c). The phrase "continued existence" was added to Civil Rule 6 (c) in 1947 for the express purpose of preventing "reliance upon the continued existence of a term as

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2d 101 (Mo. App. 1943); *Firemen's Fund Ins. Co.* v. *Griffin*, 176 Okla. 94, 54 P. 2d 1032 (1936); *Glasscock* v. *Bryant*, 185 S. W. 2d 595 (Tex. Civ. App. 1944);

a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules." Note of Advisory Committee to amended Rule 6 (c); see Moore's *Federal Practice* (2d ed.), pars. 6.02, 6.09. Accordingly, a federal court now has unlimited power over civil judgments comparable to that existing under the term rule only within the 10 days allowed by Rule 59 for motions for new trial or to alter or amend the judgment. (See also Rules 50 (b), 52 (b)). Compare, as to criminal cases, *United States* v. *Smith*, 331 U. S. 469. Thereafter, its power over its judgments, save for clerical errors (Rule 60 (a)), is limited to the grounds prescribed in Rule 60 (b). Since a motion under Rule 60 (b) "does not affect the finality of a judgment or suspend its operation" (Rule 60 (b)), and can be granted only for limited grounds (*cf. Ackermann* v. *United States*, 340 U. S. 193), it seems apparent that such a motion should be regarded as a substitute for and enlargement of the remedies formerly available after expiration of the term in which the judgment was entered. Compare Moore, *Federal Practice*, Ch. 60; Moore & Rogers, *Federal Relief from Civil Judgments*, 55 Yale Law Journal 623 (1946).

Except in those jurisdictions which have thus replaced it, however, the term rule continued as a normal incident of the judicial process. The power of a court to alter or amend its judgment during term time was firmly established

long before Congress passed the first denaturalization statute in 1906, and the exercise of that power was always deemed a part of the original proceeding. The Maryland courts had such power in 1906 when the first denaturalization statute was passed and in 1943 when petitioner's application for citizenship was heard. Absent a clear expression of contrary intention in the naturalization law, the normal judicial power of the Maryland court to control its judgment during the term would pertain to this naturalization proceeding. We turn, therefore, to the question whether Congress has shown a clear intent to abridge that power.

C. *Neither the language nor the legislative history of the denaturalization statute reveal an intent to alter or abridge the power of the courts to control their judgments while the proceedings are in fieri.*—By Sec. 15 of the Nationality Act of 1906 (34 Stat. 601), which was substantially the same as the present Section 338 of the Nationality Act of 1940, Congress authorized a proceeding for the cancellation of a certificate of naturalization by an independent suit in equity. It imposed upon the United States Attorneys [15] the

[15] The 1906 Act was amended by Act of May 9, 1918 (40 Stat. 544, 8 U. S. C. (1934 ed.) 405) so as to allow institution of suits for cancellation by the Commissioner or Deputy Commissioner of Naturalization. However, the Act of 1940 (54 Stat. 1158, 8 U. S. C. 738 (a)) returned to the original language of the 1906 Act, limiting such authority to the United States Attorneys.

duty to institute such a proceeding in any court having naturalization jurisdiction in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," and provided for service by publication on a prospective defendant "absent from the United States or from the district in which he last had his residence," such notice to be given in accordance with the laws of the state or place where suit is brought. On its face, this provision is concerned solely with the remedies available to revoke a judgment of naturalization which has become final; it has nothing to do with the question when a judgment becomes final. The legislative history sheds very little light on the intended effect of the denaturalization section, for it was merely one part of a general statute which was primarily concerned with revamping the process of naturalization so as to prevent fraud at the outset.

Nefarious practices in the field of naturalization long antedated the movement for reform in this field, which began shortly after the civil war.[16] By 1905 the situation was so bad that the President appointed a special commission to investigate and report on the subject. See H. Rep. 1789, 59th Cong., 1st sess., p. 2. The Commission's report (H. Doc. 46, 59th Cong., 1st sess.) shows that

[16] For a full historical discussion, see Comment, *Pre-Statutory Denaturalization*, 35 Cornell L. Q. 120 (1949).

the commission's primary purpose was to prevent fraud by removing the incentives for fraud. Thus it suggested that fees be raised to make the cost too high for political committees to pay the cost of naturalization (p. 12) and that in large cities only federal courts have the power to naturalize so as to prevent competition for fees (pp. 24–25). It also suggested uniformity in fees and in the wording of the certificate of naturalization and the creation of a central federal bureau to supervise immigration matters (pp. 28–29). While the bill proposed by the majority of the commission contained a provision authorizing proceedings for cancellation of certificates (p. 106), the report made no reference thereto. Appendix D to the report did, however, contain a letter from a Special United States Attorney stating, *inter alia*, that 1916 certificates had been cancelled through civil proceedings in the preceding two-year period (p. 76).

The House Committee which drew up the bill which became the Nationality Act of 1906 had before it the report and draft submitted by the President's Commission (H. Rep. 1789, 59th Cong., 1st sess., pp. 2–3). It referred to the fact that 1916 certificates had been cancelled in civil proceedings (p. 2) and later mentioned that the bill proposed to give the United States power to institute proceedings for cancellation of a certificate (pp. 5–6, 7). It gave no explanation of the pro-

posed scope of such provision. In the debate on the bill, the chairman reported that the section, which as drawn had merely empowered the United States to bring cancellation proceedings, had been changed to make it the duty of the United States attorneys to bring such actions, 40 Cong. Rec. 7874. A member asked if the provisions for cancellation for fraud remained, and the chairman replied "They remain, and under existing law it can be done now, as decided by the Federal courts." 40 Cong. Rec. 7874. That is the extent of Congressional debate on this section.

Under the circumstances, all that can be said is that Congress certainly revealed no clear intention to alter or abridge the established power of courts to control their judgments during term time. The general statements on which petitioner relies, to the effect that the 1906 Act was designed to establish a uniform system of naturalization, must be read in their context. The 1906 Act did provide for more uniformity in naturalization than had theretofore existed. It provided for a central federal bureau to keep records (Sec. 1, 34 Stat. 596); it standardized the form of the petition for naturalization (Sec. 4, 34 Stat. 596–597) and certificate of naturalization (Secs. 3, 27, 34 Stat. 596, 605–606); it defined the duties of clerks of naturalization courts (Secs. 12–14, 34 Stat. 599–601); and regulated procedure

on naturalization hearings (Secs. 6–12, 34 Stat. 598–599).[17]

Nevertheless, it did not change the system, which had been adopted from the beginning of our national government, of using state as well as federal courts to perform the judicial function of naturalization. It did not undertake to regulate the mode of judicial procedure in such state courts except as to matters pertaining di-

[17] The statement of Representative Bonynge, quoted in part by petitioner (Br. 14), establishes no more than this. The full statement is as follows:

Mr. Bonynge. It also provides a uniform procedure from the inception of the application for naturalization until it is consummated in the final issuance of the certificate. It attempts to guard against frauds and crimes that have been committed against our naturalization laws, and prescribes penalties for the commission of such crimes. It establishes a Bureau of Naturalization in Washington, which will be required to keep an accurate record of the naturalization certificates issued throughout the United States, and it authorizes the United States Government, through the United States attorneys, in cases where cause may exist, to oppose a petition for naturalization. It provides a procedure for the cancellation of certificates of naturalization that may be obtained through fraud of any kind. It provides that the alien should live at least one year in the State in which he makes the application for naturalization. It provides that the examination of the alien shall be made in open court, and provides for two witnesses to be examined before the court. Now, that is it, in a general way; I suppose I have omitted some other provisions, and while I did not, perhaps, mention the one, two, three, or four to which the gentleman from New York has referred, it includes those and some others that I have heretofore mentioned.

Mr. Cockran. The gentleman has misapprehended my question. I did not ask what all the features of the bill were,

rectly to the fees, forms, records and hearings on naturalization. In fact, the bill as originally introduced provided for appeals in naturalization cases from all lower courts, state as well as federal, to the federal Circuit Court of Appeals, but this innovation for federal control of state judicial proceedings proved so startling to a number of Congressmen that the proposed section was dropped. 40 Cong. Rec. 3645, 7784–7787. No specific provision for appeal was made in the 1906 Act. Clearly, therefore, the general statements that the act was designed to provide a uniform system of naturalization did not mean that the procedures were intended to be uniform in every detail.

The legislative history set forth above does show that the framers of the 1906 Act and Congress were aware that certificates of naturalization were being cancelled by federal courts without statutory authority before 1906. Most of such suits were apparently by independent suits in equity or by motions in the nature of equitable relief after expiration of the term. *United*

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but how far they modified the requirements and conditions of naturalization—not the procedure of naturalization.

Mr. Boxnyge. The procedure can be put under one head as one feature of the bill. I think that is a very, very important feature; that we should exercise the authority given to us by the Constitution of the United States to establish—to use the exact language of the Constitution—"to establish an uniform rule of naturalization." That this bill does; and I think it is very important [40 Cong. Rec. 3650–3651].

States v. *Norsch*, 42 Fed. 417 (E. D. Mo., 1890); *Tinn* v. *United States District Attorney*, 148 Cal. 773, 84 Pac. 152 (1906). See also *Pintsch Compressing Co.* v. *Bergin*, 84 Fed. 140 (C. C. D. Mass.); *Commonwealth* v. *Paper*, 1 Brews. (Pa.) 263 (1868); *State ex rel. Lacy* v. *Brandhorst*, 156 Mo. 457, 56 S. W. 1094 (1900).[18] Of the few reported decisions only one appears to have involved correction of a judgment in term time. *United States* v. *Kornmehl*, 89 Fed. 10 (D. N. J., 1898). The statements in Congress show clearly that, alarmed by the frauds that had been committed in naturalization cases, the legislature intended by Section 15 of the 1906 Act to remove any doubt as to the power of courts at any time to revoke, for fraud or illegality, naturalization judgments which had become final. But nothing in the legislative history of the section suggests that Congress gave any thought to the inherent power of a court to reconsider its judgments not merely for fraud or illegality but for any reason

[18] See 9 Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897 (Wash. 1898), 116, stating that President Harrison informed Congress in 1890 that "the vacation by judicial decrees of fraudulent certificates of naturalization, upon bills in equity filed by the Attorney-General in the circuit court of the United States, is a new application of a familiar equity jurisdiction. Nearly one hundred such decrees have been taken during the year * * *." It is believed that, with the exception of *United States* v. *Norsch*, 42 Fed. 417 (E. D. Mo.), all of these cases have gone unreported.

affecting their correctness, during the term in which they were rendered.[19]

In short, both the text of the Act and its legislative history indicate that Congress was legislating with respect to the remedies available once a judgment of naturalization has, by operation of the ordinary rules, become final. Nothing in the statute or the circumstances attending its adoption suggests that Congress intended to abrogate the usual rules as to when a judgment becomes final. As we have shown in Point B above, the control by a court of its judgment during term is entirely different in scope and in character from the relief available to set aside a final judgment after term. Whatever may be the rule with respect to proceedings to vacate a judgment after term, that rule would not apply to a court's power to control its judgment during the term, for a judgment set aside during the term has, in legal effect, never been a judgment at all. A statute regulating procedure to set aside a final judgment thus does not reach a judgment which has not achieved finality. The power to set aside a judgment during term time is part of the normal judicial process by which the judgment is rendered, and is of the same nature as a petition for

[19] In general, provisions regulating the procedure for vacating judgments after term are construed as not abrogating the unlimited power of a court over its judgments within the term. *First Nat. Bank of Dunkirk* v. *Smith*, 102 Ohio 120, 130 N. E. 502 (1921); *McGinnis* v. *Beatty*, 28 Wyo. 328, 204 Pac. 340 (1922).

rehearing which is accepted as a regular part of the judicial process.

As we have pointed out above, in *Tutun* v. *United States*, 270 U. S. 568, this Court held that a judgment of naturalization is appealable, despite the absence of a statutory provision for appeal, since naturalization is a judicial function and appeal is part of the normal judicial process.[20] That decision also recognized that appeals in proceedings brought in state courts lie to state appellate courts. The decision therefore necessarily has two corollaries; (1) that a judgment of naturalization is not final when rendered but may be negated by a judicial process other than that set forth in Section 338 (a) of the Nationality Act[21]

[20] While the *Tutun* case involved a judgment refusing naturalization, the decision recognized that an appeal by the Government would lie from an order granting citizenship. See 270 U. S. at 577. Appellate courts have repeatedly entertained jurisdiction of appeals from judgments granting naturalization. E.g., *Moser* v. *United States*, 340 U. S. 910; *Estrin* v. *United States*, 80 F. 2d 105 (C. A. 2); *Repouille* v. *United States*, 165 F. 2d 152 (C. A. 2); *United States* v. *Larsen*, 165 F. 2d 433 (C. A. 2); *Daddona* v. *United States*, 170 F. 2d 964 (C. A. 2), certiorari denied, 336 U. S. 961; *In Re Jow Gin*, 175 F. 2d 299 (C. A. 7); *United States* v. *Hrasky*, 240 Ill. 560, 88 N. E. 1031 (1909); *In re Bogunovic*, 106 P. 2d 247 (Cal. App. 1940).

[21] It may be noted that revocation of citizenship may be effected under the Nationality Act of 1940 without resort to equity proceedings under Sec. 338 (a). Under Section 338 (e) revocation is mandatory upon criminal conviction for knowingly procuring naturalization in violation of law. Under Section 704, naturalization granted under Secs. 701 and 702 to persons serving in the armed forces may be revoked upon the subsequent dishonorable discharge of such naturalized person.

and, indeed, by a judicial proceeding not specified in the Act at all; and (2) that the procedure by which such result may be achieved may vary with the forum selected for naturalization. In so holding, the Court expressly rejected an argument that the provision for denaturalization in Section 15 (now Section 338) of the Act precluded vacation of a naturalization judgment by the ordinary processes of appeal. It said (270 U. S. at 579):

> It is also argued that Congress manifested the intention of denying the usual method of appellate review by providing in § 15 for a bill in equity to cancel certificates of citizenship. The remedy afforded to the Government by § 15 is narrower in scope than the review commonly afforded by appellate courts. Moreover, there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the district court.

The *Tutun* case therefore answers any argument against recognition of the term rule on the ground that the denaturalization statute represents the only possible way in which a judgment once rendered may be set aside.[22]

[22] The basic assumptions of the decision in *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C. A. 7), on which petitioner relies, are that a judgment of citizenship becomes final the moment it is issued and that procedure for naturalization and denaturalization must be wholly uniform in state and federal courts (see 161 F. 2d at p. 395). As pointed out above, the *Tutun* decision necessarily implies a holding to

The *Tutun* case also answers any argument of policy based on the fact that, by recognition of the term rule, the period during which a naturalization judgment cannot be deemed completely final would vary in different jurisdictions depending upon the length of the term. The time for appeal may vary from state to state just as the term rule may vary from state to state. Such differences of procedure are an inevitable result of our federal system and the Congressional decision to utilize state as well as federal courts for naturalization. In fact Section 338 itself provides for varying procedures by specifying that notice by publication shall be given in accordance with the laws of the state or place where suit is brought. The fact remains that the court's control of its judgment in term time is as established a part of the judicial process as the right of appeal. Since this Court has held that the right of appeal exists despite the considered decision of Congress not to provide therefor in the statute, it necessarily follows that the equally well established right of a court to control its judgment during the term must be deemed to have continued where the legislative history shows that Congress did not even consider the possibil-

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the contrary on both points. The particular aspect of the *Volpe* decision which is in conflict with the decision below was not decisive of the ultimate issue in the case, for even if the power to revoke had been recognized, there was an issue as to whether *Volpe* had received notice of revocation. 161 F. 2d at p. 396.

ity of legislating with respect thereto. Since there is no evidence of any Congressional intention to alter or abridge the term rule, the reasoning of the *Tutun* decision requires a holding that the court's established power to control its judgment during term time was unaffected by the Nationality Act.

II

THE PROCEEDINGS IN THE STATE COURT ARE NOT SUBJECT TO ATTACK AS VIOLATING DUE PROCESS.

Petitioner also asserts that, assuming a state court has power within the same term of court to reconsider a judgment of naturalization, the particular proceedings here followed were violative of due process. It is elementary that the state court's judgment is subject to collateral attack in federal court only for lack of jurisdiction. *Spratt* v. *Spratt*, 4 Pet. 393. Here the state court had jurisdiction of the parties and the proceeding. Petitioner was notified and was present at a hearing in open court. Accordingly, any contention that those proceedings were improper should have been made in the Maryland courts and cannot be made on collateral attack.

In any event, however, the state court proceedings did not violate any constitutional right of petitioner. As we have seen, the state court had full authority in accordance with ordinary judicial procedure, upon a showing that there was additional evidence which it should consider, to vacate its initial order and set the matter down

for further hearing. Once that order had been vacated, the matter stood as if it had never been entered (see p. 23, *supra*), and the court could properly proceed as on an original application for naturalization. So treating the proceeding, it is clear that the court not only did not deny due process, but acted in full conformity with the naturalization statutes. There is no constitutional requirement that naturalization be granted or denied by judicial procedure. *Tutun* v. *United States, supra,* 576–7. The Nationality Act merely requires (except in cases where there has been a preliminary hearing by a naturalization examiner) that the court hold a hearing in open court at which the witnesses are examined under oath in the presence of the court. § 334 (a). There is no requirement of advance notice to either party of such a hearing; section 324 plainly contemplates a hearing on the same day on which the application is filed.[23] Indeed, the hearing on December 9, 1943, on the basis of which the court denied naturalization, appears to have been considerably less summary than the initial hearing on December 2 (see pp. 3–8, *supra*).[24]

[23] The requirement of § 334 (c) that the hearing be held not less than 30 days after filing of the petition is inapplicable here (see note 2, p. 4, *supra*); in any event that requirement, imposed for the benefit of the United States, does not specify any particular form or time for notice of a hearing.

[24] In the foregoing discussion, we have construed the judgment of the Maryland court as a judgment denying naturalization. In effect, what the court did was to set aside its

Since a proceeding for naturalization is civil in nature, the applicant has no constitutional right either to have counsel supplied or to have the court ask him whether he desires counsel. Cf. *Brown* v. *Johnston*, 91 F. 2d 370, 372 (C. A. 9), certiorari denied, 302 U. S. 728; *Hodge* v. *Huff*, 140 F. 2d 686, 689 (C. A. D. C.), certiorari denied, 322 U. S. 733. "Most petitioners appear in court without counsel." *In re Jow Gin*, 175 F. 2d 299, 303 (C. A. 7). Petitioner had the burden of proving his eligibility for naturalization. *Estrin* v. *United States*, 80 F. 2d 105 (C. A. 2); *Petition of Zele*, 127 F. 2d 578, 580 (C. A. 2); *Lakebo* v. *Carr*, 111 F. 2d 732, 734 (C. A. 9). Since naturalization is a privilege, doubts must be resolved in favor of the United States; the court must be "satisfied that the test of allegiance has been met". *Baumgartner* v. *United States*, 322 U. S. 665, 675; cf. *United States* v. *Manzi*, 276 U. S. 463, 467. Plainly, on the evidence before

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prior order, to restore the case on the calendar for immediate hearing, and upon such hearing to hold that petitioner was not entitled to receive a certificate of naturalization. (See R. 19–20.) In other words, the court considered the same evidence both on the question whether the prior order should be vacated and on the final disposition of the cause—a practice which is common on applications for rehearing or new trial.

If we should be wrong in thus regarding the judgment as a final disposition of petitioner's application, petitioner would have even less reason to complain since, on that view, he would have had further opportunity to attempt to persuade the Maryland court of his eligibility for naturalization.

it, the Maryland court could hold that petitioner had failed to satisfy that burden.

We find no warrant in the record before the Maryland court for suggestion that petitioner was denied opportunity to present his case. Petitioner made no request for postponement or continuance of the hearing or for opportunity to obtain and confer with counsel. He frankly admitted that he had testified falsely at the first hearing as to his approval of our form of government (R. 19) and that he was unwilling to fight for the United States (R. 18). He did so deliberately, on the basis of the way he had felt "for several weeks" (R. 18), and with full recognition that "if I don't want to fight for this country I can't expect to remain in this country" (R. 18). His testimony was in effect an abandonment of his naturalization application, and he recognized it as such. That he may subsequently have regretted his deliberate choice would not, even under the liberal standards of Rule 60 (b) of the Federal Rules of Civil Procedure, have afforded a basis for an application to the court rendering the judgment to vacate it after a lapse of 4½ years. Compare *Ackermann* v. *United States*, 340 U. S. 193; *United States* v. *Borchers*, 163 F. 2d 347 (C. A. 2); *United States* v. *Eichenlaub*, 180 F. 2d 314 (C. A. 2), certiorari denied, 339 U. S. 983; *United States* v. *Willumeit*, decided February 23, 1950 (C. A. 7), certiorari denied, 340 U. S. 834; *United States* v. *Klapprott*, 9 F. R. D. 282

(D. N. J.), affirmed, 183 F. 2d 474 (C. A. 3). *A fortiori,* the validity of the state court proceeding is not open to collateral attack in a federal court.

CONCLUSION

The power of the court to control its judgments during the term is a long-standing recognized part of the normal judicial process which will not be deemed abrogated without clear expression of legislative intent to effect a change. Since neither the language nor the legislative history of the denaturalization statute reveal an intent to alter or abridge the term rule, the Maryland court had authority to exercise that power with relation to the judicial proceeding for naturalization. The judgment below should accordingly be affirmed.

Respectfully submitted.

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